Chapter 1
Private Ordering in Family Law: A Global Perspective

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Abstract This chapter describes and analyses the perpetual pendular movement of family law between status and contract from a global perspective. It focuses on substantive and procedural family law with regard to parents and children and with regard to life partners. The conclusions of the analysis are quite ambivalent. Firstly, whereas family law is clearly moving towards contract with regard to old family formations, the contrary is true for new family formations. Surrogacy and same-sex partnerships for example crystallise as new statuses. Secondly, the movement towards contract is rarely considered to be contractualisation *pur sang*, with civil effect. Pacts, agreements, arbitration awards and instruments alike with regard to domestic relations indeed are not considered to be as binding upon the parties or the courts as contracts in general. Thirdly, the movement towards status not necessarily witnesses family law exceptionalism vis-à-vis private law. States indeed increasingly intervene in private law relations in general. In sum, the high permeability of the demarcations between the State, the family and the market impedes a categorial approach – which may be a desirable outcome all in all.

Introduction

Subject and Objectives

This paper aims at drawing the global lines of convergence and divergence with regard to contractualisation in family law. It tries to scan the blurred lines between (the exceptionalist nature of) family law on the one hand and general characteristics of private and public law on the other hand. The division between status and contract is often not clear-cut and this chapter wants to shed some light on the many shades of grey.

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We will analyse contractualisation from a legal-technical perspective in both substantive (Section "Substantive family law") and procedural (Section "Court jurisdiction") family law. The former refers to substantive arrangements about formation, content and dissolution of family formations, while derogating from the default legal regime. The latter encompasses the validity of procedural arrangements and the possibilities to oust state court jurisdiction. Section "Main features of family law" will first present the main features of family law systems throughout the world. Conclusions will be drawn in section "Conclusions". One of the conclusions will be that private ordering is a better, softer, denominator than contractualisation for recent evolutions in family law. We have used that better denominator in the title of this chapter.

Our legal-technical approach may complement the theoretic research into the nature of family law from legal-historical, economic and ideological perspectives (for example Brinig 2000; Halley 2011a, b; Marella 2006). We did not intend to take any of those stances.

Methodology

Drawing on preliminary research (Swennen 2013), a topic breakdown was proposed to national reporters. Taking into account their feedback, a questionnaire of 28 questions, both general and specific, was distributed. Twenty seven reports where submitted.[1] The current chapter is based on these reports and some additional sources.

[1] **Argentina** *Graciela Medina* Universidad de Buenos Aires | *Ursula C. Basset* Pontificia Universidad Católica **Belgium** *Yves-Henri Leleu* Université de Liège & *Nicole Gallus* Université Libre de Bruxelles **Brazil** *Luiz Edson Fachin* Federal University of Parana **Burundi** *Gervais Gatunange* Université du Burundi **Cameroon** *Yannick Serge Nkoulou* Université de Ngaoundéré **Canada (Québec)** *Christine Morin* Université Laval **Canada (Common Law)** *Robert Leckey* McGill University **Croatia** *Branka Rešetar* University of Osijek & *Ivana Milas Klarić* University of Zagreb **Denmark** *Ingrid Lund-Andersen* University of Copenhagen **England & Wales** *Jens M. Scherpe*, Gonville & Caius College, Cambridge & *Brian Sloan* Robinson College, Cambridge **Finland** *Sanna Koulu* University of Helsinki **France** *Hugues Fulchiron* Université Jean Moulin Lyon III **Germany** *Anne Röthel* Bucerius Law School Hamburg **Greece** *Dimitra Papadopoulou-Klamari* University of Athens **Ireland** *Maebh Harding* University of Warwick & *Louise Crowley* University College Cork **Italy** *Maria Rosaria Marella* University of Perugia **Malaysia** *Sridevi Thambapillay* University of Malaya **Poland** *Tomasz Sokołowski* Adam Mickiewicz University of Poznań **Puerto Rico** *Pedro F. Silva-Ruiz* **Portugal** *Rita Lobo Xavier* Catholic University of Portugal **Romania** *Marieta Avram & Cristina Nicolescu* Universitatea din Bucureşti **Scotland** *Jane Mair* University of Glasgow **Spain** *Carlos Martínez de Aguirre Aldaz* Universidad de Zaragoza **Taiwan** *Chung-Yang Chen* Soochow University Taipei **The Netherlands** *Katharina Boele-Woelki* University of Utrecht & *Merel Jonker* University of Utrecht **Turkey** *Kadir Berk Kapancı* Istanbul Bilgi University **USA** *Adrienne Hunter Jules & Fernanda G. Nicola* American University Washington College of Law.

Not all reports are included in this edited volume. The reports that were not included are available online on the congress website: http://www.iacl2014congress.com/.

A presentation of the results of the research according to the traditional divisions of legal systems in families has proved not to be functional. Similarities and differences in the different legal systems' family law follow other lines of division on which this chapter is based.

Main Features of Family Law

What Is Family Law?

In all legal systems, family law can be situated at the intersection of private law and public law,[2] and in many systems it is still influenced by religious and customary norms.[3] For that reason family law is qualified as a particular field of law, in-between social security law and the market. It is a space for private solidarity, not subject to commodification (Halley and Rittich 2010; Marella 2006).[4]

Family law in the narrow sense is considered a part of private or civil law, insofar it concerns the formation, exercise and dissolution (and some 'ancillary issues'[5]) of 'nuclear' family formations of two types: parents and children on the one hand and life partners on the other.[6] Family formations in the extended family are rarely mentioned.[7] This chapter mainly concerns family law in the narrow sense. It also encompasses (civil) family proceedings.

Family in its broad sense is considered a part of public law, insofar it concerns the effects of (private law) family formations in different branches of public law, for example social security law, tax law, labour law, criminal law, migration law.[8]

The distinction between private and public family law however is not always clear-cut,[9] e.g. with regard to child protection law.

[2]For example Denmark; Poland; Québec.

[3]For example Burundi; Cameroon; Scotland; Taiwan.

[4]Italy.

[5]USA.

[6]For example Belgium; Canada (Common Law); Croatia; Finland; Germany; Greece; Netherlands; Puerto Rico; Romania; Scotland.

[7]See *Burden v United Kingdom*, (App. 13378/05), 28 April 2008 [GC], ECHR 2008-III.

[8]For example Canada (Common Law); Scotland.

[9]Denmark; Poland.

Constitutionalisation

Different forms (and phases) of constitutionalisation of family law – with quite different currents – can be distinguished.

In a first phase, a closed system of family law existed – and in some legal systems still exists. Under such system, a *numerus clausus* of family relations is constitutionally[10] or otherwise protected, by so-called institutional guarantees.[11] Under those guarantees, a minimum protection must apply to certain family formations (for example marriage) and can neither be repealed nor be applied to other family formations (for example registered partnership).

Whereas *formation* and *dissolution* of family formations are regulated by imperative norms,[12] the State usually abstained from intervening in the *exercise* of those formations. The content of the relation parent-child and (formerly) husband-wife was left to family autonomy – that is: the father-husband until well in the twentieth century – with minimal State intervention. The *internal* dimension of the family is thus protected through a non-interventionist approach under which State interference must be justified.[13] Some Constitutions more particularly explicitly protect the right for parents to provide for the education of their children[14] (under State control however, see hereinafter).

Institutional protection is also provided for the *external* dimension of the family, which is protected as entity – yet not as a legal person[15] – in different branches of public law. This external dimension of family formations is more strongly protected in legal systems where constitutional protection of the family[16] (and marriage)[17] exists and particularly so where the government has a duty to develop a socio-economic family policy.[18] In systems where no constitutional protection of the family exists, private family law merely 'affects' public family law.[19] One example is the reduction of social security benefits in function of private law family solidarity

[10] Burundi; Greece; Turkey.

[11] Germany: art. 6(1) Basic Law; Ireland; Portugal.

[12] For example Croatia; Greece.

[13] Portugal; Malaysia.

[14] Burundi: art. 30 Constitution; Germany, art. 6(2) Basic Law; Ireland, art. 42 Constitution; Malaysia, art. 12(5) Constitution; Poland, art. 48 and 53.3 Constitution; Romania, art. 48 Constitution.

[15] Romania.

[16] Brazil: art. 226 Constitution; Cameroon: Preamble to the 1996 Constitution; France: Preamble to the 1946 Constitution; Spain: art. 39 Constitution.

[17] Croatia; Germany: art. 6(1) Basic Law; Greece: art. 21 Constitution; Ireland: art. 41 Constitution; Poland.

[18] Finland: art. 19 Constitution; Poland: art. 71 Constitution; Portugal; Turkey: art. 41 Constitution.

[19] Belgium; Denmark; Finland.

(support duties).[20] For this reason, also private family law is sometimes considered to concern public policy.[21]

A second phase of constitutionalisation is the constitutional review of family law in the narrow sense. Almost all legal systems provide for a system whereby a Constitutional Court,[22] the Supreme Court,[23] or even any Court,[24] may assess the compatibility of norms of family law with *constitutional civil rights*, upon petition by the parties in a case. This had led to various *para legem* reforms in family law. Other legal systems only organise an (*a priori*) assessment if so required by the executive branch.[25] In some legal systems, it is impossible for the judiciary to constitutionally review legislation.[26]

In a third phase, judicial review of family law is carried out in function of *international human rights instruments*. The traditional divide between monist[27] and dualist legal systems, concerning the direct applicability of human rights instruments, seems to fade away. Most dualist legal systems either have incorporated human rights instruments in their national law[28] or anyhow allow judicial interpretation of national law in function of international instruments to some extent.[29] International and regional human rights bodies in either case gain influence.[30]

The second and third phases of constitutionalisation have caused quite discordant evolutions in family law.

On the one hand, States have taken a non-interventionist stance. Family law is no longer a *numerus clausus* system in most legal systems and new family formations are also protected legally or even constitutionally. With regard to the *internal dimension* of the family, autonomy is interpreted individually rather than collectively.[31] The emancipation of formerly dependent family members allows relaxing the laws on formation and dissolution of family relations. The institutional protection of the *external dimension* of the family also seems to have diminished, without having disappeared. Individualisation in socio-economic branches of public law (particularly social security law and tax law) however has not yet been achieved.

[20] Canada (Common Law); Denmark.

[21] For example Québec.

[22] Belgium; Croatia; France; Germany; Poland; Portugal; ROC (Taiwan); Romania; Spain; Turkey.

[23] Brazil; Ireland; Malaysia; USA.

[24] Argentina; Canada (Common Law); Denmark; Finland; Greece.

[25] Cameroon.

[26] Netherlands.

[27] Belgium; Brazil; Cameroon (except vis-à-vis the Constitution); Croatia; France; Germany; Greece; Netherlands; Poland; Portugal; ROC (Taiwan); Spain; Turkey.

[28] Burundi; Denmark; England & Wales; Ireland; Malaysia; Romania; Scotland.

[29] Canada (Common Law); England & Wales; Finland.

[30] For example Argentina; USA.

[31] For example Greece; Puerto Rico; Romania.

On the other hand, interventionism has increased. The individualisation of family relations has caused the State to more actively interfere with the *internal dimension* of the family.[32] Rather than leaving the exercise of family formations to party autonomy, the State intervenes to secure dignity[33] and to palliate unequal positions.[34] This is particularly the case in parent-child relations,[35] in the light of the extraordinary success of the Convention of the Rights of the Child (see the Chapter on that Convention in this edited volume) and the focus on children rights' protection in many legal systems.[36] The direct applicability of the CRC is controversial however.[37] The State in some legal systems also comes to the rescue of the weaker party in relations between life partners.[38] This evolution applies to both private and public family law. The criminalisation of domestic violence is the foremost example.[39] This evolution towards increasing State interventionism could be functionally described as new application of the *parens patriae*-doctrine, even though it would not strictly reflect the particular nature of that doctrine in common law systems (Wirth 2011)

With Glendon (2006), one may conclude that the State withdraws from the classic areas of regulation (formation and dissolution of family relations) and more actively intervenes in new areas (exercise of family relations).

Incongruities

The abovementioned evolutions have not yet been tackled in a congruent way in many legal systems.

Firstly, incongruities exist within private family law, for example in the legal regulation of new family formations in comparison to the former *numerus clausus*.

Secondly, private family law sometimes is incongruent with public family law. Sometimes, family formations are only taken into account either in private family law or in public family law, or are taken into account subject to different conditions.[40] For example *de facto* cohabitation sometimes is not regulated in

[32] For example Brazil; Ireland.

[33] USA.

[34] Denmark; Poland.

[35] Poland.

[36] Belgium: art. 22 *bis* Constitution; Croatia; Denmark; Finland: art. 19 Constitution; Greece: art. 21 Constitution; Ireland: Twenty-First Amendment of the Constitution (Children) Bill 2012; Poland: art. 72 Constitution; Romania: art. 49 Constitution; Scotland; Spain: art. 39 Constitution.

[37] Belgium; France.

[38] Germany: BVerfG 103, 89.

[39] Croatia; Greece; Ireland; Taiwan; USA.

[40] Finland; Québec; Romania.

private family law, but taken into account with regard to social benefits.[41] The other way round, the organisation of absence of leave in labour law[42] for example does not always take into account the realities of recomposed families.

Thirdly, (vertical or horizontal) multi-level governance of families also causes incongruities. In many legal systems, vertical multi-level governance implies that different governmental levels are competent to regulate private *versus* public family law,[43] or even share competences in both private and public family law.[44] This may also lead to incongruent court orders.[45] In other legal systems, family formations are governed differently at a same level according to religion or ethnicity ('horizontal multi-level governance').[46]

Substantive Family Law

A Bird's Eye View

Contract: Private Autonomy

The principle of private autonomy governs private law in most legal systems, meaning that contractual freedom is the basic assumption.[47] Contracts may not derogate from imperative legal provisions nor may they infringe public policy (*ordre public*) or the *bona mores*.[48] The nature of the sanction depends on the interest that is protected.[49] More generally, a covenant of good faith and fair dealing applies throughout all (pre- and post)contractual phases. Some legal systems provide so explicitly in general,[50] whereas other legal systems include specific obligations. Examples are the duty of information in the pre-contractual phase, the prohibition of abuse of rights in the phases of execution and performance of a contract and the prohibition of exoneration clauses in the post-contractual phase.[51] Particularly relevant for this chapter is that some legal systems provide for the revocability (subject to damages), if not the invalidity, of contractual clauses

[41] Finland; Netherlands; Québec.

[42] Portugal.

[43] Belgium; Scotland; USA.

[44] Canada (Common Law); England & Wales; Spain.

[45] Canada (Common Law).

[46] Cameroon; Malaysia.

[47] For example Greece; Taiwan.

[48] Belgium; Canada (Common Law); Croatia; Denmark; England & Wales; Finland; France; Germany; Greece; Ireland; Netherlands; Portugal; Puerto Rico; Québec; Romania; Spain; Taiwan; Turkey.

[49] Belgium; Netherlands.

[50] Germany: '*Treu und Glauben*'; Québec.

[51] Portugal; Puerto Rico.

pertaining to family rights.[52] Examples are terms and conditions in contracts that would encourage or discourage family formation (for example not to (re)marry) or family behaviour (for example chastity) and that are considered void (see hereinafter).[53]

In light of the aforementioned trend of constitutionalisation, State interventionism in private law is increasing. A '*social public order*' ('*ordre public social*') seems to emerge, under which the State imperatively protects either general interests or the private interests of the weakest party in a contractual relation.[54] The foremost areas of State intervention are consumer law, tenancy and labour law.[55]

Status: No Private Autonomy

Further reaching and contrary to private law in general, private autonomy is even not the basic assumption in private *family* law. Under the qualification of *status* – as opposed to "contract", private family law is traditionally withdrawn from the realm of private autonomy[56] in two respects.

On the one hand, most legal systems consider private family law as imperative law as a whole, and to derogate by contract from rules on formation and dissolution of family formations is not accepted. This prohibition also applies to the basic rules on the exercise (content) of those formations.[57]

The prohibition applies in both directions.

Firstly, *opting in* family law was prohibited, and still is to some extent. The principle of a *numerus clausus*[58] of family formations has long stood in the way of the validity of contracts between cohabiting partners with regard to their pecuniary rights and duties. Such contracts were considered *contra bona mores* because they would organise sexual relations ('*pretium stupri*').[59] Today, cohabiting partners still may not opt in the personal rights and duties of spouses or registered partners, such as cohabitation and fidelity.[60] Opting in pecuniary rights and duties however is generally accepted.[61]

[52] Portugal; Turkey.

[53] Canada (Common Law); Croatia; Portugal.

[54] Finland: '*welfarist contract law*' or '*social civil law*'; Portugal; Romania: '*ordre public économique*'.

[55] Germany; Greece.

[56] For example: Belgium; Cameroon; Finland.

[57] Brazil; Croatia; France; Malaysia; Netherlands; Poland; Portugal.

[58] Comp. Greece; Turkey.

[59] England & Wales; Italy; Romania; Scotland.

[60] Belgium.

[61] Canada (Common Law); Belgium; Romania; Scotland.

Secondly, *opting out* family law is not allowed either.[62] Systems influenced by the *Code napoleon* for example explicitly provide that in their (prenuptial) contracts on (matrimonial) property, spouses or registered partners may not derogate from the core of statutory rights and obligations between them or from the norms on parental responsibility.[63]

Only few legal systems accept greater party autonomy as a starting point.[64]

On the other hand, there is great restraint to consider family agreements between parents (and children) or life partners – where allowed – as binding contracts *pur sang*.[65] The **Scottish** report qualifies this evolution as "*consensualisation*" of family law. Generally, such family agreements are referred to with a different legal terminology than that used in contract law in general.[66] Remarkably, the qualification as "non-law" (Carbonnier 2013) of family agreements more strongly applies to families going concern than to dissolved family formations, where agreements are considered to be binding more easily.[67]

Mapping Family Law Exceptionalism

It is not an objective of this chapter to research the origins and *rationale* of family law exceptionalism (hereto for example Nicola 2010). The analysis hereinafter may rather serve as a mapping of the seemingly growing number of derogations from the exceptionalist position, at the least in the context of old family formations,[68] whereby

- either opting in or out private family law is allowed
- or family agreements on the content of family relations are considered legally binding contracts.

The growing acceptance of the general private law principle of party autonomy in family law of course also implies the application of the general limits to contractual

[62] Greece.

[63] For example Belgium: art. 1388 and 1478 CC; Cameroon: art. 1388 CC; France: art. 1388 CC; Portugal: art. 1618, 2° and 1699 CC; Puerto Rico: art. 1268 CCPR and *Albanese D'Imperio v Secretary of the Treasury*, 223 F 2d 413 (1955) (single joint tax return); Québec: art. 391 Civil Code; Romania: art. 332 para 2 CC.

[64] Canada (Common Law); Spain; Scotland. To a lesser extent: Malaysia; Netherlands.

[65] England & Wales; Finland; Germany; Greece; Romania; Scotland: *Radmacher v Granatino* [2010] UKSC 42, retrieved at http://www.bailii.org/uk/cases/UKSC/2010/42.html on 24 October 2014; Taiwan.

[66] Germany.

[67] Belgium; England & Wales: *Merritt v Meritt* [1970] EWCA Civ 6, retrieved at http://www.bailii.org/ew/cases/EWCA/Civ/ on 21 June 2014, as distinguished from *Balfour v Balfour* [1919] 2 KB 571 and also see Greece.

[68] France; Greece.

freedom.[69] Firstly, the principle of dignity[70] and the best interest of the child for example serve as general parameters for State control of contractual freedom, usually through judicial discretion.[71] Some legal systems for example explicitly forbid corporal punishment of children in application thereof.[72] In other systems such punishment is still explicitly allowed.[73] Secondly, the theory of undue influence for example is a parameter for State intervention in (ex-)spousal relations.[74] Some legal systems more generally safeguard the 'fair balance' between spouses.[75]

Parents and Children

Introduction

'Parents and Children'

The first subject area for which we will map private ordering is vertical (or intergenerational) family law, of which only the relation between parents and children will be researched as the most relevant part. We will not elaborate other intergenerational relationships. Hereinafter, we will subsequently discuss

- legal parenthood,
- parental responsibility and the exercise thereof, and
- maintenance obligations.

Whereas those three aspects of the law on parents and children are closely linked with each other, they nevertheless are based on different assumptions and different persons may qualify as parents as a consequence.[76]

[69] Brazil.

[70] France; Spain. Comp. Puerto Rico.

[71] Belgium; Canada (Common Law); England & Wales; France; Ireland; Poland; Romania; Scotland; Spain; Turkey.

[72] Denmark.

[73] Taiwan.

[74] Belgium: Supreme Court 9 November 2012, www.cass.be; Canada (Common Law); Croatia; Denmark; England & Wales; Portugal; Scotland.

[75] For example Romania: art. 332 para 2 CC; Spain: art. 66 CC. Comp. Puerto Rico: 31 L.P.R.A. § 3552 (Westlaw).

[76] For example Croatia; Finland; Scotland.

Legal Parenthood

General

Definition The legal parents of a child are the persons from whom he descends in the first degree in terms of legal kinship.[77]

Both *filiation* (in the narrow sense) and *adoption* qualify as bases for legal parenthood.[78] In some legal systems[79] adoption is considered to be a kind of filiation (in the broad sense), besides filiation based on blood. Adoption is accepted in all many legal systems, yet only some legal systems have both strong and weak adoption.[80]

The best interest of child serves much less as a decision parameter with regard to filiation than with regard to adoption. The reason is the assumption that the establishment of filiation vis-à-vis the biological parents is in the best interest of a child *per se*.[81]

Filiation (in the Narrow Sense)

Between *Status* and Contract The rules on filiation are imperative, as part of one's *status*. Transfers of parenthood are outside the "*perimeter*"[82] of contractual freedom.[83] The link to public policy ('*ordre public*') for example is very clear in **Denmark**, where the regional state administration will itself institute parentage proceedings in case paternity is not registered at birth.

In many legal systems, the imperative rules are at the least flavoured with a taste of self-determination, for example in the context of voluntary acknowledgement.[84] Such forms of merely intentional parenthood however cannot be considered as contractualisation, for they are either unilateral, or non-enforceable or subject to State intervention.[85] The **Canadian** reporter thus refers to intention and autonomy "*rather than using the language of contract*".

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[77] For example Romania.

[78] For example Malaysia.

[79] For example Québec, art. 522 *et seq.* CC.

[80] For example Belgium; Burundi.

[81] Portugal.

[82] Romania.

[83] Brazil; Cameroon; Canada (Common Law); Croatia; France; Germany; Greece; Ireland; Malaysia; Netherlands; Québec; Romania; Taiwan.

[84] France.

[85] Germany; Romania; Spain.

Many legal systems also accommodate agreements on parenthood to some extent, for example in the context of (medically assisted) artificial reproduction techniques.[86] Contracts on (first) motherhood – for example in the context of surrogacy – are less accepted than contracts on fatherhood or second parenthood though. These agreements, "*however contractual in its core*" according to the report on **England & Wales**, mostly are not considered to be civil contracts[87] because the only comprise the exercise of statutory options. They are strictly controlled and do not allow the parties to organise parenthood themselves.[88] For example, **Belgian** sperm donors may opt to donate non-anonymously, but the establishment of legal family ties between them and the children conceived with their sperm is never allowed.[89]

Sometimes, the intentional and biological parents may informally agree on the role the biological parents may play in the life of the child; but such agreements are not directly enforceable.[90]

First Parent: Mother The basic assumption in almost all legal systems is that the *mother* is the (legally) female person who gave birth to a child: *mater semper certa est*.[91] Only in **Ireland** it is still debated whether genetic motherhood should not prevail over birth motherhood as the basis for maternity.

Only some Western legal systems[92] allow *surrogacy agreements*, whereby the maternity of the birthmother is either transferred to the genetic or intentional mother, or waived in favour of a single man or gay couple. As a consequence of such agreement, the presumption of parenthood will not be applied to the birthmother's partner, but to the prospective parent's (male or female) partner. Surrogacy agreements are not always enforceable in case the surrogate mother refuses to cede the child or the prospective parents refuse to accept the child.[93]

The judicial approach towards the consequences of informal surrogacy agreements, in systems where surrogacy is not explicitly regulated or even explicitly forbidden, is quite divergent. Such agreements will usually not be validated for the purposes of establishing parenthood.[94] Adoption would be necessary in these cases.

[86] Québec; France.

[87] Scotland.

[88] Scotland; France.

[89] Belgium: art. 27 and 56 Act on Medically Assisted Reproduction 2007.

[90] Belgium; Finland; Netherlands.

[91] Belgium; Brazil; Burundi; Cameroon; Canada (Common Law); Finland; England & Wales; Germany; Greece; Poland; Scotland; Turkey; USA.

[92] Canada (Common Law); England & Wales; Greece; USA.

[93] Canada (Common Law); England & Wales; Netherlands; Scotland; USA.

[94] Belgium; Germany. See however the Ireland report: the issue will be resolved in the best interest of the child.

Various approaches also exist with regard to the recognition of surrogacy in private international law.[95]

Most Western legal systems accept *ovum donation*,[96] after which the birthmother and not the genetic mother will be considered the legal mother in application of the *mater semper certa est*-rule. One step further is *ovum sharing*[97] in a lesbian couple, in which case the genetic mother will be the second parent (see hereinafter) of her genetic child to whom the gestational mother has given birth. Ovum sharing seems less acceptable than ovum donation, for there usually is no medical indication for it.

Second Parenthood "Contenders"[98] for second parenthood are manifold in Western legal systems. In other systems, the traditional rule of paternity of the husband still and almost exclusively applies.

In all legal systems, a legal presumption of paternity applies to the (legally) male husband of the mother at the time of the birth or of the conception of the child: *pater is est quem iustae nuptiae demonstrant*.[99] He probably is the genitor of the child – in the light of the duty of fidelity – or at the least has chosen to be the parent. The presumption of paternity generally is rebuttable.[100] Self-determination applies to some extent in this regard. The father appointed in application of the presumption may decide not to rebut his parenthood, even if he knows he is not the genitor. In some legal systems, the genitor himself moreover may not contest the paternity of the husband. The father appointed in application of the presumption also is excluded from contesting his paternity in many legal systems in case he has agreed to donor insemination.[101]

In some legal systems this presumption also applies to the (legally) male registered partner[102] of the mother.

Further away from biological foundations, a presumption of second motherhood,[103] second female parenthood[104] or co-motherhood[105] applies to the female spouse or female registered partner of the mother in some Western legal systems

[95] See *Labassée v France*, (App. 65941/11), 26 June 2014 [5th section], ECHR; *Menneson v France*, (App. 65192/11), 26 June 2014 [5th section], ECHR. Also see Argentina.

[96] See the overview in *S.H. and others v Austria*, (App. 57813/00), 3 November 2011 [GQ], ECHR 1879, § 35.

[97] USA.

[98] Term used in the USA report.

[99] For example Belgium; Brazil; Burundi; England & Wales; Finland; Germany; Ireland; Poland; Scotland; Turkey; USA.

[100] For example Belgium.

[101] For example Denmark; England & Wales; Finland; Poland; Spain.

[102] Canada (Common Law); Greece; Netherlands.

[103] Netherlands; Québec; Spain.

[104] England & Wales; Scotland.

[105] Belgium; Denmark.

('*parens is est*').[106] In these cases, the foundation of parenthood is social,[107] or even merely intentional, rather than biological.[108] This also why legislatures apparently wrestle with semantics in this regard.

Voluntary acknowledgment of parenthood is possible in case the *mater semper certa est*- (or *parens is est*-) rule cannot be applied.[109] In most legal systems, acknowledgment is not subject to any proof other than a confirmation by the other parent. Other systems require a biological[110] or social[111] proof of parenthood.[112] In **Taiwan**, implicit acknowledgment moreover results from financially maintaining a child as a parent. Such parenthood is further reaching than the *in loco parentis*-doctrine in other legal systems.[113] The decision to voluntarily acknowledge a child even if there is no biological or social foundation for parenthood is protected to some extent. For example the mother who consents to the acknowledgement of a child by a man whom she knows is not the genitor, cannot contest his paternity later under **Belgian** law. As mentioned above, this can hardly be considered as contractualisation. The same applies to the decision of a child to (no) rebut a parenthood presumption or to (not) use his veto against an acknowledgement.[114]

Acknowledgement as "route to parenthood"[115] *de facto* mostly applies to determine male paternity.

There is no uniform application of the rules on acknowledgment in the few systems where same-sex parenthood exists. In the **Netherlands**, the female partner of the birthmother can acknowledge a child as second mother; in **Belgium** the same is possible under the term "co-mother". In both legal systems, acknowledgement as a second parent is not possible for the male partner of the father; he must adopt the child. In the **USA**, the male partner of the father can be appointed as second parent.

Some legal systems also contain specific provisions regarding (medically assisted) artificial reproduction techniques, in which case the intentional parents are appointed as legal parents and whose parenthood cannot be rebutted.[116]

Some systems also apply this in favour of the single parenthood of the mother. The **Canadian** and **Irish** reporters however refer to case law whereby the known

[106] England & Wales; Scotland.

[107] Canada (Common Law); Netherlands.

[108] Croatia; Portugal; Spain; USA.

[109] Belgium.

[110] Finland; Portugal.

[111] France.

[112] Brazil.

[113] For example Canada (Common Law).

[114] Comp. Belgium; Burundi.

[115] Scotland.

[116] Denmark; England & Wales; Greece; Québec; Finland; Romania; Spain; USA. A reform is also underway in Argentina.

donor was nevertheless recognised as the father.[117] The same applies in **Denmark** in case of 'informal' insemination.[118] In **Finland**, the parties to artificial insemination may agree that the donor to a single mother will be considered to be the father.[119]

Third Parenthood Only **Canada (Common-Law)** and the **USA** accept triple parenthood, whereby the birthmother, the intentional second male or female parent and the genitor are considered the legal parents, subject to their agreement thereto.[120]

Transfers and Waivers Beside the abovementioned contractual transfers or waivers, a legal parent in all legal systems cannot waive or dissolve his parenthood otherwise than giving the child up for adoption (see below).[121] Only the **Finnish** reporter mentions one out-court possibility for a married couple to transfer the husband's paternity to the biological father, subject to the agreement of all parties concerned.[122]

The possibility to give birth discretely or anonymously only exists in few legal systems,[123] and is forbidden in most.[124] In case of discrete birth, the identity of the mother may exceptionally be disclosed to the child if so decided after balancing the interests by an independent administrative or judicial body. In case of anonymous birth, the identity of the mother may never be disclosed to the child (or *vice versa*).

Adoption

Adoption All legal systems conceive adoption as a child protection measure, under strict State control. It is considered status rather than contract.[125] This applies to a lesser extent[126] to intra-family adoptions, aiming at composing or re-composing parenthood in new family formations.[127]

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[117] Canada (Common Law); Ireland.

[118] Denmark.

[119] Finland.

[120] Canada (Common Law) (British Columbia and Ontario); USA.

[121] For example Burundi, England & Wales; Ireland.

[122] See sections 2, 15(1), 16a and 34(3) Paternity Act 700/1975, retrieved at www.finlex.fi on 16 October 2014.

[123] France; Luxembourg. Proposals are also made in Belgium and in Brazil.

[124] Croatia; England & Wales; Germany; Poland; Portugal; Romania; Spain.

[125] Belgium; Brazil; Cameroon; Canada (Common Law); England & Wales; Finland; Germany; Greece; Italy; Portugal; Québec; Romania; Scotland; Spain; Turkey; USA.

[126] USA.

[127] For example by same-sex parents: *X. and others v Austria*, (App. 19010/07), 19 February 2013 [GQ], ECHR 148, § 100.

A contractual approach towards adoption may indeed endanger the child's dignity.[128]

Some legal systems however legally protect contractual forms of adoption. Firstly, courts seem to take into account informal adoption contracts when assessing whether formal adoption is in the best interest of the child.[129] Secondly, some forms of informal adoption seem to be recognised in **Canada (Common Law)**[130] and **Malaysia**.[131] Thirdly, some legal systems accommodate open adoption, in which case the parties agree on maintaining contact between the family of origin and the child.[132]

Parental Responsibility

Introduction

Context On the one hand, parental responsibility (also: parental authority,[133] custody[134] or guardianship[135]) implies rights and obligations with regard to the care for a child, which encompasses both the right to make educational choices ('legal custody', yet the other aspects of custody of course also are 'legal') and residence, contact and information rights ('physical custody').

On the other hand, parental responsibility encompasses the management of the child's property, which usually also comprises usufructary rights on the child's property.[136]

Again, the imperative nature of the legal regulation of attribution, exercise and content of parental responsibility is pointed at.[137] Agreements between the parents and between the parents and third parties however are possible to some extent. Such agreements are not considered to be contracts with civil effect.[138]

[128] Cameroon.

[129] USA.

[130] Customary contractual adoption forms of aboriginal peoples.

[131] Malaysia.

[132] England & Wales; Finland. This is the default system in Poland.

[133] Canada (Common Law).

[134] USA.

[135] Ireland.

[136] Belgium; Cameroon; England & Wales; France; Germany; Greece; Romania; Spain.

[137] For example Belgium; Brazil; Croatia; France; Germany; Ireland; Netherlands; Portugal; Romania; Spain.

[138] Germany; Poland.

Attribution and Exercise

Default Position The default position is the attribution of parental responsibility to the legal parents.[139] This attribution is sometimes guaranteed constitutionally[140] and stripping a parent from his parental responsibilities is under strict scrutiny by the courts.[141]

The mother of a child always has parental responsibility.

In most legal systems, the second parent will acquire parental responsibility in case parenthood is established at the time of the birth of the child or soon after, or in case (s)he is (still) partnered to the mother. Some legal systems do not automatically vest the second parent with parental responsibility in other cases.[142] The **European Court of Human Rights** has found that this is discriminatory vis-à-vis the father who is not married to the mother.[143] An agreement with the mother or a court order would be required in order to vest these parents with parental responsibilities.[144] Separation or divorce will not strip the second parent from his existing parental responsibility.[145]

Some Western legal systems provide for parental responsibility for persons who are not a legal parent, and particularly for *social* parents who were or are partnered with a parent[146] and for *biological* parents.

In the **Netherlands**, parental responsibilities can only be granted *as a whole* and cannot be granted to more than two persons, that is: the parent with sole parental responsibility and a stepparent. A State commission will advise on multi-parenthood by 2016.

In different common law and mixed legal systems and in **Finland**[147] the attribution of parental responsibility is also possible in part and without a maximum of two persons applying.[148] For example sperm donors may be vested with some parenting rights such as access and information.[149] Such system seems in line with

[139] Belgium; Brazil; Canada (Common Law); Croatia; France; Germany; Greece; Turkey; USA.

[140] Ireland: art. 41 Constitution.

[141] England & Wales; Ireland.

[142] Denmark; England & Wales; Finland; France; Germany; Ireland; Netherlands; Scotland.

[143] *Zaunegger v Germany*, (App. 22028/04), 3 December 2009 [5th section], ECHR, § 63.

[144] For example Scotland.

[145] Finland; France; Netherlands.

[146] England & Wales; France; Netherlands; Scotland (father of second female parent, not stepparent).

[147] Finland.

[148] Canada (Common Law); England & Wales; Scotland.

[149] USA [Contracting Assisted Reproduction Parentage].

recent case law of the **European Court of Human Rights**[150] and of the **Dutch** Supreme Court.[151] In **Canada (Common Law)**

> feminist scholars have criticized the obstacles to women's becoming 'autonomous mothers', including courts' willingness to attribute parental status or visitation rights to a man (other than an anonymous donor) on account of the genetic link between him and a child.[152]

Joint exercise of parental responsibility applies in most legal systems as the default system,[153] particularly for important educational decisions. In common law systems, persons vested with parental responsibility may act alone sometimes.[154] This is also the case in all legal systems for daily and for urgent matters. The courts may also decide on sole exercise of parental responsibility in the best interest of the child.

In **Cameroon**, only the father exercises parental responsibility over his marital children.[155]

Waivers & Transfers Waivers and transfers of parental responsibility (as a whole or in part) are generally not accepted[156] and often explicitly forbidden[157]:

> Article 376 **French** CC: "waiver or transfer of parental responsibility can have no effect".
>
> Section 2(9) Children [**England, Wales, Scotland and Northern Ireland**] Act 1989: "a person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another".
>
> Article 1882 of the **Portuguese** Civil Code "parents can not waive the parental responsibilities nor any of the rights that it confers particularly".

For example it usually is not possible for parents to contract on parental responsibility in case they live together ('going concern'), for example so as to agree on sole instead of joint custody.[158]

A third party also cannot waive the qualification of standing *in loco parentis*.[159]

Only some legal systems however contain a *duty* to exercise e.g. residence or contact rights.[160]

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[150] For example *Ahrens v Germany* (App. 45071/09), 22 March 2012, ECHR.

[151] For example *Hoge Raad* 30 November 2007, ECLI:NL:HR:2007:BB9094, retrieved at www.rechtspraak.nl on 18 June 2014.

[152] Canada (Common Law).

[153] Belgium; Brazil; France; Netherlands; Greece; Puerto Rico; Québec; Taiwan; Turkey.

[154] England & Wales.

[155] Cameroon.

[156] For example Argentina; Belgium; Cameroon; Germany; Greece; Ireland; Netherlands; Poland; Portugal; Québec; Turkey.

[157] Romania: art. 31 (2) Act n° 272/2004 of 21 June 2004.

[158] Belgium; Canada (Common Law); Denmark.

[159] Canada (Common Law): *Doe v Alberta*, 2007 ABCA 50 [http://canlii.ca/t/1qhjr] (with regard to maintenance).

[160] For example Croatia; Poland.

(Cont'd). Parents Not Going Concern Transfers of parental responsibilities are accepted to some extent for parents not going concern. In case of separation or divorce, agreements on the attribution of parental responsibility are allowed[161] and sometimes even obliged.[162] The court will only impose an arrangement in case the parents do not reach an agreement. Agreements anyhow are under the scrutiny of State bodies (see hereinafter section "Court jurisdiction"). The **Dutch** reporters consider the parenting plan required upon separation quite contrary to contractual freedom, since the civil code *imposes* both the plan and its content.[163] Also the content of parenting plans is sometimes State determined. The **Italian** report points at the fact that imposing joint parental custody of course reduces the contractual freedom of the parents.

(Cont'd). Sharing and Delegating Besides, some legal systems accommodate so-called co-parenting agreements between parents and third parties[164] or openness agreements between adoptive parents and the biological parents (also see above),[165] sometimes subject to judicial approval.[166]

Some legal systems furthermore allow persons with parental responsibility to transfer the *de facto* custody or other aspects of parental responsibility to a third party.[167] The third parties concerned however would only acquire precarious privileges.[168]

Finally, delegation of parental responsibilities is also possible under court supervision.[169] Interestingly, in **France** also *shared delegation* is possible. This is a court order under which a parent or both parents share (part of their) parental responsibility with a third party, who can be a family member or other trustworthy next-of-kin, or a child protection service or institution.[170]

In all aforementioned cases, the relation between the third party and the child may be judicially protected against the will of the parents. The foundation thereof is

[161] For example Denmark; Finland; Greece; Malaysia; Portugal; Romania.

[162] In most cases when parents want to divorce by mutual consent (for example Argentina; France; Greece; Romania; Spain), but in the Netherlands in all cases of parental separation or divorce.

[163] Netherlands.

[164] England & Wales; USA.

[165] Canada (Common Law).

[166] Cameroon; France; Portugal; Romania.

[167] For example Belgium; England & Wales: s. 2(9) Children [England, Wales Scotland and Northern Ireland] Act 1989; Finland; Greece; Poland; Romania; Taiwan.

[168] For example Argentina; Québec.

[169] For example Denmark.

[170] France: art. 377 CC.

the family life that has been built up, rather than the agreement that existed between the parents and the third party.[171]

(Cont'd). Foster Care or Adoption Parents may give up their children for foster care or adoption; in some countries emancipation of the child is also possible.

What is decisive in these cases is the best interest of the child, and certainly not the right to self-determination of the parent(s).[172]

We will not further elaborate child protection law in this chapter.

Content

Religious and Philosophical Education Particularly the religious and philosophical education of children by their parents is explicitly protected in different legal systems. For example in **Belgian** and **Spanish** law, the parents' instructions on religious and philosophical education must be respected in case of guardianship resp. foster care. For example, article 32 of the **Irish** Adoption Act requires that the parents knowingly consent to adoption by an applicant who is not of the same religion (if any) as the parents and the child.

This emphasis on the religious and philosophical education by the parents may be out-dated in light of the rights of the child and has been severely criticised (for example Dawkings 2006).

Parenting Agreements Some legal systems explicitly or implicitly allow parents going concern to reach an understanding on future practices regarding their parental responsibilities.[173]

> For example the **Ontario** Family Law Act (R.S.O. 1990, c. F.3, s. 52 (1)) explicitly provides that "[t]wo persons who are married to each other or intend to marry may enter into an agreement in which they agree on [. . .] (c) the right to direct the education and moral training of their children, but not the right to custody of or access to their children;
>
> Article 376-1 of the **French** Civil Code more implicitly states that "the Family Court may [. . .] , take into consideration the pacts which the father and mother may have freely concluded between them [. . .]."

Such private arrangements also sometimes are encouraged, for example in (law-)packs in **Scotland** and in **England & Wales** and by the courts in **France**.[174] It however seems unusual for parents to conclude arrangements of this kind.[175]

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[171] See for example *Hokkanen v Finland,* (App. 19823/92), 23 September 1994 [Chamber], 19 EHRR 139, § 64.

[172] France; Spain.

[173] For example Burundi.

[174] France.

[175] France; Spain.

As aforementioned, the situation is different in case of separating or divorcing parents. These parents may, and sometimes must, reach an agreement on joint or sole parental responsibility and sometimes also on some educational choices and on the residence of the child.

Legal Nature of Parenting Agreements 'Family Constitutions' (McClain 2006), 'Domestic Contracts',[176] 'Family Pacts'[177] or instruments alike governing parental responsibility usually are not considered enforceable civil contracts.[178] For example article 4 of the **German** Act on the Religious Upbringing of Children provides that "*agreements on the religious upbringing of a child have no civil effect*".[179] Article 341 § 2 **Turkish** Civil Code even provides that such agreements are deemed void.[180] The **Scottish** Government explicitly indicates in the Parenting Agreement for Scotland pack that

> "it is important to remember that the Parenting Agreement itself is not a legal contract and is not intended to be enforced by the courts. By completing and signing the Parenting Agreement you are not making a legally binding commitment, this is not its purpose." The signature box specifies that "by signing above, you are simply confirming what you have jointly agreed and there is no legal commitment in doing so."[181]

The reasons therefore are the following.

Firstly, agreements cannot oust the jurisdiction of the courts to determine the best interest of the child.[182] In most legal systems, the agreement between the parents will only become enforceable if so ordered or homologated by court (see hereinafter section "Court jurisdiction"). In the light of the respect for family privacy, however

> a court order should not be made unless it would be better in all the circumstances of a case to make one

in **Scots** law.[183] The **English** report elaborates that sometimes issuing a court order, which endorses a parental agreement may be the better option.[184] The courts may also refrain from making agreements between the parents enforceable and issue a

[176] Canada (Common Law).

[177] France.

[178] Croatia; Finland; Germany; Greece; Ireland; Netherlands; Poland; Portugal; Scotland; Turkey; USA.

[179] Germany; Netherlands: *Hoge Raad* 20 May 1938, NJ 1939, 94; Poland.

[180] Turkey.

[181] Scotland: s. 1(5) Children Act 1989 and England & Wales.

[182] Canada (Common Law); England & Wales: *AI v MT* [2013] EWHC 100 (Fam); France; Germany: *Bundesgerichtshof* 11 May 2005, *FamRZ* 2005, 1741; Greece; Ireland; Spain. See also for Canada (Common Law) *Doe v Alberta*, 2007 ABCA 50 [http://canlii.ca/t/1qhjr], § 26 (with regard to maintenance).

[183] Scotland.

[184] England & Wales.

consent order[185] so as to allow them to petition the courts later without having to prove changed circumstances.

Secondly, the parents can always petition the court to review their arrangements in the light of changed circumstances or, even without changed circumstances, in the best interest of the child (see hereinafter section "Court jurisdiction").

Thirdly, parental agreements in some legal systems are not binding upon the child who is capable of forming his own views. This is particularly so with regard to religious and philosophical choices.[186]

Maintenance

Default Rules

Maintenance obligations – in kind or in money – exist towards children in all legal systems and are closely linked with public family law.[187] In some systems,[188] but not in other,[189] the obligation applies beyond the age of majority in favour of children who are still studying.

Legal parents have maintenance obligations whether or not they exercise parental responsibility. Third parties with parental responsibility sometimes also have maintenance obligations.[190] Furthermore, such obligations sometimes also rest on third parties with no parental responsibility, e.g. the genitors of the child or the stepparent.[191]

Contractual Arrangements

Because of the link with public family law, contractual arrangements can only concern modalities of the maintenance obligation, but not the obligation itself.[192] Parents in other words cannot shift their responsibility onto collective resources.[193] They also are stimulated to agree on child support rather than collecting it through State agencies (Skinner and Davidson 2009).[194]

[185] England & Wales; France.

[186] Denmark; Ireland: s. 17(2) Guardianship of Infants Act 1964; Romania; Scotland; Turkey.

[187] For example Scotland.

[188] Belgium; Puerto Rico; Turkey.

[189] Cameroon; France.

[190] Netherlands.

[191] Canada (Common Law); England & Wales; Ireland; Netherlands; Poland.

[192] Argentina; Germany; Malaysia; USA.

[193] Romania.

[194] England & Wales.

It is generally accepted that third parties may assume maintenance obligations by contract.

Partners

Introduction

Plan

The denominator "Husband and Wife" covers the law on private law relationships between adult socio-affective, romantic or sexual partners only in a minority of legal systems.[195] We have therefore chosen the neutral title "Partners". Hereinafter, we will first provide a short general overview of the three generally accepted types of relationships, before discussing private ordering of respectively formation, content and dissolution of (formal) relationships. We will not elaborate Living Apart Together (LAT)-relationships.

General Overview

Marriage

Marriage exists, under that name, in all legal systems and still is the foremost status, 'both qualitatively and quantitatively'.[196] It brings along imperative statutory intervention with regard to its formation, content and dissolution.

Some reporters point at a de-institutionalisation of marriage,[197] which becomes rather party than State centric.[198] For example, divorce-on-demand is now available in some legal systems (see hereinafter).

Besides, the general law on obligations and contracts is also increasingly applied to spouses in case marriage law would not sufficiently protect their interests, for example in order to compensate the contribution by one spouse in the other spouse's business or property[199] (see hereinafter).

A growing number of Western legal systems, and also **Brazil** following a Constitutional Court decision, have opened marriage to partners of the same sex in recent years.[200] This is not (yet) the case in the Eastern European, Middle- and Far-Eastern and African systems.

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[195] For example in Burundi; Cameroon; Malaysia; Poland; Romania; Taiwan.

[196] Belgium.

[197] France.

[198] USA.

[199] Belgium; France.

[200] Belgium; Brazil; Canada (Common Law); England & Wales; France; Scotland; The Netherlands; USA (*partim*).

Marriage is still reserved to two partners in all systems except in **Cameroon** and some of the **Malaysian** states, the latter under their respective Muslim Family Law Acts.

Registered Partnership

Registered partnership schemes are available in a majority of legal systems. A patchwork of regimes exists on which generally two different mindsets seem to apply.

On the one hand, legislatures have created registered partnership schemes as "*functional equivalent to [exclusively opposite-sex] marriage*"[201] and marriage law on formation, content and dissolution is (gradually) mirrored into the registered partnership.[202] Some of those regimes, but not all, are reserved to same-sex couples. Small, but symbolically important, differences with marriage seem to subsist, not only in the 'vertical' (parent-child) effect of registered partnership, but also in its 'horizontal' content.[203] Examples are the impossibility to opt for a common family name, the absence of a duty of fidelity and easier dissolution.

In some of those legal systems, marriage has also been opened to same-sex couples. The exclusively same-sex registered partnership thus became 'redundant' and has been abolished for future registration in **Denmark**,[204] and will probably be abolished in several states in the **USA**.[205] This is not (yet) the case in **England & Wales**, where the paradoxical result is that opposite-sex couples can only marry, but same-sex couples have a choice between marriage and civil unions.[206] Different opposite-sex couples have contended before the **European Court of Human Rights**[207] that this difference in treatment is discriminatory. Interestingly, the **Dutch** registered partnership – for both opposite-sex and same-sex partners, was deliberately upheld after the opening of marriage. Socio-legal research had shown that there was a societal demand for a non-symbolic alternative to marriage (Boele-Woelki 2007).

On the other hand, legislatures have conceived registered partnership schemes as 'mini-marriages', accessible for both opposite- and same-sex partners.[208] These

[201] England & Wales.

[202] Finland; Germany; Ireland; The Netherlands; Scotland; USA. A same reform is underway in Croatia. Also see Canada (Common Law).

[203] Finland; Ireland; The Netherlands.

[204] Denmark.

[205] USA.

[206] England & Wales.

[207] *Ferguson and others v United Kingdom* (2011), pending.

[208] Belgium; Canada (Common Law); France.

schemes were rather contractual of nature.[209] They have fewer legal consequences in both private and public family law and hence formation and dissolution are also more leniently regulated.

Some reporters however point at a trend towards "*matrimonialisation*" of these schemes,[210] which is now considered to be a civil status indeed.

Cohabitation

In a minority of legal systems, cohabitation is still considered contrary to the *numerus clausus* of family relations.[211] For example a surviving partner cannot claim damages in tort law against the person responsible for the death of the other partner.

In some other legal systems, cohabitation is just ignored.[212]

A growing number of legal systems attach legal consequences to cohabitation in *public family law*, for example for tax purposes, in social security schemes or in provisions on protection against domestic violence.[213]

In *general private law*, cohabitation is taken into consideration for example in the context of employee benefits.[214]

A variety of approaches finally exist with regard to the *private family law* perspective towards cohabitation. Firstly, the application of the general law on obligations and contracts to cohabitants is accepted.[215] This means, on the one hand, that cohabitants may contractually organise their rights and obligations towards each other without risk of qualification of those arrangements as *pretium stupri* (reward for sexual relations) and thus void for public policy reasons *per se*:

> The fact that a man and a woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property or expenses. Neither is such an agreement invalid merely because the parties may have contemplated the creation or continuation of a nonmarital relationship when they entered into it. Agreements between nonmarital partners fail only to the extent that they rest upon a consideration of meretricious sexual services.[216]

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[209] France.

[210] France.

[211] For example Turkey.

[212] For example in Italy; Romania.

[213] Belgium; England & Wales; Finland; France; Portugal; Québec; Scotland; USA.

[214] USA.

[215] See however Italy.

[216] *Marvin v Marvin* (1976) 18 Cal.3d 660, retrieved at http://online.ceb.com/calcases/C3/18C3d660.htm on 24 April 2014. Also see Cameroon; Denmark; England & Wales; France; Italy; Québec.

In some legal systems, such cohabitation agreements are explicitly provided for.[217] On the other hand, in absence of an agreement, cohabitants can rely on general legal concepts such as unjust enrichment, without being barred therefrom on the basis of their relationship.[218] As the **Canadian** (**Common Law**) report puts it:

> "Love" does not justify a transfer that would otherwise be reversible as unjust and the services rendered will usually be valued in a market oriented way.[219]

Even more, the application of the general legal concepts is sometimes "*matrimonialised*" in order to better take into consideration the particular context of the relationship.[220] For example, a fiduciary or confidential relationship between the partners may be accepted more easily, or unjust enrichment may lead to a 50/50 division of acquired property by the family joint venture as if there was a marriage.[221]

> Restricting the money remedy to a fee-for-service calculation is inappropriate [...]. [I]t fails to reflect the reality of the lives of many domestic partners. [...] While the law of unjust enrichment does not mandate a presumption of equal sharing, nor does the mere fact of cohabitation entitle one party to share in the other's property, the legal consequences of the breakdown of a domestic relationship should reflect realistically the way people live their lives.[222]

Secondly, some legal systems have introduced a default family law protection for cohabitants, which is either imperative,[223] or organised on either an opt-in or (controlled) opt-out[224] basis. The protection may be higher for cohabitants who reach thresholds that qualify them for (enhanced) protection, such as a minimum period of cohabitation or having a common child.[225] Interestingly, these cohabitation schemes are always based on "*approximations of marriage*",[226] even where not based on theories of common law marriage[227] or their continental counterparts. The **USA** report rightly question such paradigm. The legal protection so granted primarily concerns the property of the partners or one of them, and

[217] For example Greece.

[218] Belgium; France; Italy; Portugal; Puerto Rico; The Netherlands; USA.

[219] Canada (Common Law).

[220] Germany: BGH 9 July 2008, XII ZR 179/05, BGHZ 177, 193.

[221] Canada (Common Law): *Kerr v Baranow* 2011 SCC 10, retrieved at http://scc-csc.lexum.com/ on 24 April 2014.

[222] Summary of *Kerr v Baranow* 2011 SCC 10, retrieved at http://scc-csc.lexum.com/ on 24 April 2014.

[223] Brazil; Finland: Act 26/2011 on the Dissolution of the Household of Cohabiting Partners, retrieved at www.finlex.fi on 16 October 2014, particularly section 3; Portugal; Scotland; USA.

[224] Ireland.

[225] Finland; Ireland.

[226] USA.

[227] See on the difference Puerto Rico.

particularly the household home and assets. They may also concern compensatory payments.[228] Support obligations are more rarely applied,[229] as they still seem to be considered the exclusive core of the civil status acquired through marriage or registered partnership.[230]

Formation

Exempting from Mandatory Conditions?

Mandatory rules apply to the substantive and formal conditions to marry and, to a lesser extent, to enter into a registered partnership. Neither (future) spouses themselves nor third parties may exempt the spouses from respecting these conditions.[231] Not only the spouses but also State agents and all third parties concerned may usually petition the court to declare null and void a marriage concluded contrary to those conditions.[232]

Some substantive conditions apply in most legal systems, such as the conditions of competence and being of age – with a possibility of dispensation[233] – and impediments on the basis of kinship and affinity.

As a solemn contract, formal relationships must always be concluded before a public authority. This generally is the civil registrar, and in many systems[234] also or an agent of minister of recognised religious or philosophical organisations, at least for opposite-sex relationships.[235]

Adding Conditions?

Notwithstanding the abovementioned public interest in the formation of marriage and registered partnership, the fundamental freedom to marry or not to marry is linked to the contractual nature of entering into a marriage or a registered partnership.[236] In some legal systems, the freedom to marry is constitutionally

[228] For example in Finland.

[229] For example in Croatia.

[230] For example Denmark.

[231] See for example Argentina; Burundi; Canada (Common Law); Croatia; Québec; Ireland; Malaysia; Poland; Romania; Taiwan; Turkey; USA.

[232] For example Croatia; Québec.

[233] Abolished in The Netherlands in 2014.

[234] For example Brazil; Canada (Common Law); Croatia; Denmark; Greece; Portugal; Scotland; Spain.

[235] Denmark; Scotland.

[236] Germany; Portugal.

guaranteed.[237] All legal systems also particularly contain rules on the full and free consent of both spouses[238]: "*Consensus non concubitus facit nuptias*".[239] Some legal systems therefore strictly regulate marriage or dating agencies.[240]

However, contractual freedom is not accepted when it comes to limiting the freedom to marry or to enter into a registered partnership, or to adding substantive or formal conditions. This applies both to the (future) partners themselves and to third parties (see hereinafter).[241] One of the reasons is that the parties, by consenting, enter into a relationship which content is imperatively regulated and that they cannot freely dissolve.[242]

(Cont'd). (Future) Partners Betrothal is explicitly regulated in some legal systems,[243] always with the *caveat* that betrothal does not civilly oblige either party to subsequently enter into marriage (or a registered partnership). Article 267 **Romanian** Civil Code explicitly forbids penalty clauses in this regard.

Depending on the circumstances of the case, refusal of marriage following betrothal can give rise to a claim in damages. The same applies in legal systems where betrothal is not explicitly regulated.

In almost all legal systems, the parties cannot limit their or each other's freedom (not) to marry or to enter into a registered partnership by adding suspensive or resolutive conditions to their consent.[244] Such limitations are considered contrary to the right to self-determination.

Some legal systems explicitly prohibit this. Article 531 of the **Argentine** Civil Code forbids marriage, celibacy or divorce and separation as conditions to a contract. Under § 1311, 2nd sentence **German** Civil Code, the consent cannot be given under a condition or time limit. Article 45, 2nd sentence **Spanish** Civil Code thus provides that the condition, term, or mode of consent shall be void.

In other legal systems, such conditions would be considered null and void for public policy reasons, for example if they concern the payment of a dowry.[245]

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[237] For example France; Portugal.

[238] For example Belgium; Brazil; Cameroon; Germany; Spain.

[239] Scotland.

[240] France.

[241] Belgium; Canada (Common Law); USA.

[242] USA.

[243] Cameroon; Romania: art. 267 and 268 Civil Code; Scotland: s. 1 (1) Law Reform (Husband and Wife) (Scotland) Act 1984; Spain: art. 42–43 Civil Code.

[244] Belgium; Brazil; Greece; Poland; Portugal; The Netherlands; Turkey.

[245] Comp. Germany: Oberlandesgericht Hamm 13 January 2011, case N° I-18 U 88/10, *NJW-RR* 2011, 1197, retrieved at http://www.justiz.nrw.de/Bibliothek/nrwe2/index.php on 2 May 2014. Not so in Cameroon.

In **Cameroon**, conditions to a spouse's consent are however accepted, such as the condition of graduating or of giving birth to a living child.[246]

(Cont'd). Third Parties Third parties may want to directly or indirectly encourage or discourage a party to enter into a formal relationship, for example through conditions to a gift or bequest or as a resolutive clause in an employment contract. Conditions or clauses may also add substantive or formal conditions to entering into a formal relationship, for example the condition (not) to marry before reaching a certain age.

A marriage or registered partnership concluded contrary to the abovementioned conditions or clauses is perfectly valid if the imperative statutory conditions have been respected.[247]

However, in the "*external dimension*"[248] vis-à-vis the third party, the consequences of not respecting the conditions or clauses will differ. In some legal systems, the – mostly financial – sanctions may apply.[249] Article 268 (1) **Romanian** Civil Code for example explicitly provides for the restitution of gifts made in consideration of a betrothal or subsequent marriage, in case the engagement is broken. In most systems however, the abovementioned conditions or clauses would be considered to infringe on the freedom (not) to marry or to be otherwise contrary to public policy and will be null and void,[250] or at the least not enforceable. Some legal systems explicitly prohibit adding conditions and clauses with regard to marriage, for example in testaments.[251]

Content

Introduction

In all legal systems, marriage and registered partnership bring about legal consequences that are at least in part imperative. These consequences are more comprehensively regulated in continental legal systems and in systems based thereon, than in other systems. In either system, the mandatory regulation of the content of formal relationships is on its return. Now that divorce or partnership dissolution is socially more acceptable, partners rather opt for relationship dissolution than to litigate on their rights and obligations standing their formal relationship. Formal relationships

[246] Cameroon.

[247] England & Wales; Finland; Germany; Greece; Romania.

[248] Terminology in Romania.

[249] Belgium; Greece; Finland.

[250] France; England & Wales; Germany: Bundesgerichtshof 22 March 2004, case N° 1 BvR 2248/01, retrieved at https://www.bundesverfassungsgericht.de/entscheidungen.html on 2 May 2014; Romania.

[251] Argentina: art. 531 Civil Code; Portugal: art. 2233° Civil Code.

basically have become schemes that make accessible a minimal protection upon divorce or dissolution, which option is now more extensively regulated than formal relationships going concern.[252]

We will hereinafter look into private ordering of the personal resp. patrimonial mandatory content of formal relationships. We will not elaborate property relations between spouses (matrimonial property regimes) as such.

Personal Content

Overview In some legal systems, personal rights and obligations in formal relationships are not explicitly provided for.[253] The matter belongs to the private sphere of the partners. Other legal systems generally refer to a duty for the partners to establish a life community (*consortium omnis vitae*).[254] In some legal systems, this *consortium* is regulated more in detail, for example by obliging to spouses to cohabit, to fidelity and to assist each other. These regulations sometimes also contain some rights the partners may agree on, such as the location of their matrimonial home, a joint family name or the decision to have children or not.[255] The applicability of this imperative content may also depend upon the choice for a covenant marriage.[256] Is does not always equally apply to registered partners.[257]

No Opting Out or In Formal partners generally are not allowed to opt *out* personal rights and obligations wholly or even partly.[258] They would risk their marriage being considered null and void, for example as sham marriage not aimed at establishing a life community.

The parties' contractual freedom is limited to exercising the options provided for in the law.[259] Their agreement however would not be considered binding in civil law for the future, for example with regard to the decision to have children or not.[260] To consider such agreements binding would be an infringement on each partner's personality rights. Only the **Burundese** and **English** reports more convincingly refer to the parties' freedom to determine the content of their marriage; in **England &**

[252]Canada (Common Law); Germany; Scotland; USA.

[253]Canada (Common Law). This will also be the case in Argentina after a 2014 reform.

[254]Germany; Ireland.

[255]Belgium; Cameroon; Croatia; Poland; Québec; Romania; Spain; The Netherlands.

[256]For the USA for example in Louisiana: La. Rev. Stat. Ann. § 9:294.

[257]Belgium; France.

[258]For example Belgium; Croatia; France; Germany; Portugal; Québec; Spain; Turkey.

[259]For example Romania: art. 308 Civil Code.

[260]For example Germany: Bundesgerichtshof 21 February 2011, XII ZR 34/99, retrieved at http://www.bundesgerichtshof.de/DE/Entscheidungen/EntscheidungenBGH/entscheidungenBGH_node.html on 2 May 2014.

Wales the law contains no explicit personal rights and obligations. An arrangement whereby the spouses decide not to consume their marriage would therefore be valid if based on an objectively reasonable argument. Only in absence of such reason could the arrangement be found invalid for public policy reasons.[261]

One generally accepted exception to the above is a separation agreement, whereby the partners agree that they will not cohabit and regulate the financial consequences of that situation.[262] The **Cameroonian** report also refers to agreements between the husband and his different spouses on their alternating cohabitation.[263]

Informal partners are not allowed either to opt *in* all or some of the personal rights and obligations between formal partners. Such agreement would be considered an infringement on their personal liberty.[264] This view can make one think on the compatibility of the rights and obligations of *matrimonium* with the formal partners' freedom.

Formal partners also case cannot add personal rights and obligations to the legal ones.[265]

"Obligations That Do Not Oblige"[266] Personal rights and obligations generally are considered not to be enforceable or at least not enforceable in kind in case they are not executed.[267] They "*do not have a civil law character, but only family law features*".[268] Parties also may not contractually provide for enforceability. A partner anyhow could easily decide to withdraw from his obligations by petitioning for divorce.[269] Agreements on personal rights and obligations in any case are considered superfluous for the law itself already obliges the partners.[270]

The parties may make their arrangements binding upon each other *indirectly* by two means. Firstly, the non-respect of personal rights and obligations is indirectly taken into consideration by courts when deciding on the irretrievable breakdown of the marriage or registered partnership, and sometimes also when deciding on the consequences of divorce or dissolution of the partnership (see hereinafter).[271] For example, an ex-spouse can be excluded from post-divorce support on the basis of faulty behaviour. With a view of assessing that behaviour, the courts may take

[261] England & Wales: *Morgan v Morgan* [1959] P 92.

[262] Argentina; Germany; Ireland; Romania: art. 309 Civil Code; Spain; USA.

[263] Cameroon.

[264] Belgium.

[265] Portugal.

[266] Spain.

[267] Belgium; Canada (Common Law); Croatia; Finland; Greece; Ireland; Portugal; Scotland; Spain; The Netherlands; Turkey; USA.

[268] Poland.

[269] Croatia; Greece; Romania; Spain; Turkey.

[270] USA.

[271] Argentina; Canada (Common Law); USA.

into consideration documents in which the partners have explicitly formulated the expectations they have from their relationship, and in which they may have defined which behaviour would cause a breakdown of the marriage or registered partnership.[272] This may be considered a soft, indirect, form of private ordering. Secondly, the spouses may include "*Good Boy Bad Boy*"-clauses[273] that may serve as carrot or stick and that give access to or exclude from financial benefits, that can be used as liquidated damages clause, or even, where allowed, can serve as a penalty clause. The matter is of course controversial, for divorce and post-divorce support have long been considered the only applicable sanctions in case of non-respect of marital duties.[274] With the introduction of no-fault divorce and support, "*Good Boy Bad Boy*"-clauses may however have a new future.[275] Also, liquidated damages seem accepted in case of cohabitants, as a part of arrangements on the legal consequences of the exercise of their freedom to end cohabitation.

Patrimonial Content

Overview The right to consortium between the spouses and, to a lesser extent,[276] between registered partners, also implies the establishment of the household as economic entity. The law in almost all legal systems regulates the core of this entity, which regulation usually comprises the protection of the household home and furniture, a mutual financial support duty, a duty to contribute to the household expenses and several liability for those expenses. These rights and obligations are enforceable and the parties may not contractually deviate from their fundaments,[277] at the least not to limit them.[278] "*Good Boy Bad Boy*"-clauses (see above) are possible. Contractual freedom is more easily accepted in case of postnuptial or separation agreements in which the partners organise their separation. These agreements remain binding *rebus sic stantibus* (see hereinafter).[279]

Cohabitants are allowed to opt in the patrimonial protection[280] and, as mentioned above, the core protection sometimes also applies as a default regime in part.

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[272] Greece; Romania; USA.

[273] The term refers to "Good Boy Bad Boy", a 1985 video work by the American artist Bruce Nauman. The term "bad boy clauses" is used by the American reporters.

[274] For example for Spain: Tribunal Supremo 30 July 1999, ROJ STS 5489/1999 retrieved at http://www.poderjudicial.es/search/indexAN.jsp on 2 May 2014.

[275] Spain; Comp. Greece; Portugal.

[276] France; Québec.

[277] Belgium; Canada (Common Law); Denmark; Finland; France; Germany; Ireland; Poland; Québec; Scotland; The Netherlands: article 1:84 (3) Civil Code; Turkey; USA.

[278] Croatia.

[279] Ireland; USA.

[280] For example USA.

Non-financial Contribution to Household Expenses A topical issue is the duty of both partners to contribute to the household expenses according to their means. It is still mostly women who are homemakers and contribute to the household expenses in kind, whereas men mostly contribute in cash or in valuable contributions in kind such as providing a house, a car etc.[281] Whereas the latter contributions are economically valued, the homemaking is not.[282]

The default legal rules in many legal systems provide for an indirect compensation for the economic weaker party-homemaker upon the dissolution of the marriage or registered partnership, through the division of the matrimonial property (if any), through support obligations and, in some cases, through compensatory payments (see hereinafter).

The question however has arisen how formal partners can avoid one of them becoming economically dependent on the other or on compensatory measures. Particularly interesting could be to explicitly provide for a compensation of non-financial contributions in the household expenses standing the marriage or partnership, and not only at its dissolution, in a prenuptial agreement.

In some legal systems, such agreements are not accepted,[283] for the marriage or registered partnership itself obliges the partners to contribute in kind and this obligation may not be monetised; it is the classical argument of *status* versus contract. There is of course a remarkable difference with cohabitants, who are not obliged to contributions in kind and who may arrange for a market-oriented compensation of their contributions, as long as the compensation cannot be considered *pretium stupri* (see above). This issue really touches the very nature of family law as distinguished from the market on the one hand and from social security on the other hand.[284]

In other legal systems, formal partners are not allowed to conclude agreements on compensation while the marriage is going concern. Some of these systems by contrast generally provide for a compensatory payment upon the dissolution of the marriage,[285] and the parties are also allowed to settle at that stage. The same applies in other legal systems that *specifically* provide for compensatory payments for the partner who contributed to the business of the other partner.[286] In some systems, the general law on obligations, contracts and companies applies and the existence of a business partnership *sui generis* is accepted.[287]

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[281] See extensively Taiwan.

[282] Italy.

[283] For example Greece; The Netherlands.

[284] Italy.

[285] Finland; France; Germany; Greece; Ireland; Québec; Romania: art. 390 Civil Code; Spain; Taiwan.

[286] For example Finland: § 64 Marriage Act; Romania: art. 328 Civil Code.

[287] Belgium; France; Germany: Bundesgerichtshof 9 July 2008, XII ZR 179/05, BGHZ 177, 193, § 27; Portugal.

Only a minority of legal systems allow registered partners to conclude agreements on the compensation of their contributions in kind in the household, standing the relationship. For example,[288] article 1:84 section "Substantive family law" of the **Dutch** Civil Code explicitly provides that the spouses may derogate from the default rules on household expenses in a written agreement. Article 1003-1 of the **Taiwanese** Civil Code provides that

> [t]he payments for living expenses of the household will be shared by the husband and the wife according to each party's economical ability, household labor or other conditions unless otherwise provided for by law or mutual agreement.

The **Taiwanese** and **Italian** reports however point at the risk of bargaining inequalities, a.o. based on gender.

In some systems, partners can rely on agreements on the organisation of the household, whereby they had agreed that one of them is the homemaker and cannot be expected to gain a professional income.[289] These agreements are considered binding until a change of circumstances occurs.

Dissolution and Its Consequences

Dissolution

Overview: The Right to Divorce Divorce law has been liberalised throughout the world during the last decades. Firstly, no-fault divorce has by and large replaced fault divorce as foremost ground for divorce. No-fault divorce is generally available under the generic denominator "*irretrievable breakdown of the marriage*",[290] which can be proved or which is presumed after a period of separation or in case of a common request or a request by one spouse that is accepted by the other. In some legal systems, fault divorce subsists either beside no-fault divorce[291] or under the umbrella of the irretrievable breakdown of the marriage, as proof thereof.[292] Secondly, 'divorce-on-demand' has been introduced, that is: the conditions under which divorce is available upon simple request have been relaxed.[293] Divorce-on-demand by one spouse is more generally available after a period of separation or of reflection. These periods are shorter or not applicable in case the spouses jointly petition for divorce or in case one spouse accepts the request of the other. Divorce

[288] Also see Cameroon; Finland; Malaysia; Portugal; Turkey.

[289] For example Belgium: art. 301, § 3, para 2 and § 5 Civil Code; Germany.

[290] Belgium; Canada (Common Law); Croatia; England & Wales; Finland; Germany; Greece; Ireland; Malaysia; Portugal; The Netherlands; Scotland; USA.

[291] For example Puerto Rico; Taiwan.

[292] For example Belgium; Canada (Common Law); Québec; Scotland; USA.

[293] Belgium; Croatia; Denmark; Finland; Spain; The Netherlands. This will also be the case in Argentina after a 2014 reform.

by mutual consent is only available as separate ground for divorce in some legal systems[294] and, where it is possible, spouses are not always expected to reach an agreement on all the consequences of their divorce. Only some legal systems allow one spouse to apply for divorce without further conditions once the spouses have been married for a minimum period. Thirdly, the formal conditions for divorce have been relaxed. In a growing number of legal systems, 'out-court divorce' is now available either before the civil registrar or before the notary public.[295] The conditions may differ according to whether or not the spouses have minor children and to whether or not they have reached an agreement on the consequences of the divorce.[296]

Only the **Burundese**, **Croatian** and **Polish** reporters refer to so-called negative conditions for divorce. In some cases the courts may refuse or postpone the divorce in the interest of the children, the other spouse or for public policy reasons.

The conditions for the dissolution of a registered partnership generally are more liberal than for divorce,[297] and may have caused the liberalisation of divorce too.[298]

In some legal systems, separation from bed and board is still available. We will not elaborate this little used regime.

Private Ordering The increasing role of self-determination notwithstanding, contractual freedom with regard to the substantive and procedural conditions of dissolution of a formal relationship is rejected in unison[299]: "*divorce is regulated by law, not by the spouses*".[300] This applies both to the partners and to third parties.

(Cont'd). Partners The parties themselves are not allowed to either give up or condition their freedom to divorce under the legal conditions. This is for example explicitly forbidden in art. 230 of the **Argentine** Civil Code. In many legal systems they may however waive their right to apply for divorce on a certain ground *ex post*, for example by pardoning the other partner for his misconduct.[301]

Three states in the **USA** have introduced forms of covenant marriage, which precludes the spouses from applying for divorce on certain grounds. The **USA** report however does not consider covenant marriage as a form of contractualisation. The

[294] It is for example in Belgium; Croatia; Greece; Malaysia; Puerto Rico; Romania; Taiwan.

[295] Brazil; Denmark; Romania; Taiwan; The Netherlands.

[296] Denmark; Romania. Comp. Québec and The Netherlands with regard to the registered partnership.

[297] Belgium; The Netherlands.

[298] Spain.

[299] Brazil; Burundi; Canada (Common Law); Cameroon; Denmark; England & Wales; Finland; France; Germany: Bundesgerichtshof 9 June 1986, *BGHZ* 97, 304; Greece; Ireland; Poland; Portugal; Romania; Scotland; Spain; Taiwan; The Netherlands; USA.

[300] Romania.

[301] Germany; Greece; Romania.

parties' freedom is limited to opting in a legal regime, which they cannot modify.[302] The system of covenant marriages is interesting with a view of accommodating religious or philosophical minorities and could be considered as legal pluralism *light*. The **European Court of Human Rights**[303] and the **Argentine** Supreme Court[304] however have rejected such forms of pluralism on the ground that the States' obligation to protect individual freedom outweighs the individual's right to waive his freedom.

One could defend the possibility for formal partners to agree on liquidated damages or even penalty clauses (where allowed[305]) in case they would use their right to divorce under conditions or within a period further defined.[306] It is accepted that cohabitants may agree on such clauses, as long as they do not limit their freedom to end cohabitation.[307] Since divorce in many systems no longer can be considered a sanction, formal partners may also want to privately arrange the exercise of their right to dissolve the relationship in the way cohabitants may.

The other way round, parties cannot exempt each other from the legal conditions for divorce.[308] As mentioned above, the explicit formulation by partners of their expectations from their relationship may however be taken into account by the courts when assessing the irretrievable breakdown of the marriage. This is a soft form of private ordering.

(Cont'd). Third Parties With regard to the legal relationship with third parties, the abovementioned findings with regard to the formation of formal relationships apply *mutatis mutandis*.[309]

Consequences of Dissolution

Overview In most legal systems, a "*multi-pillar system*"[310] is applicable to regulate the legal consequences of divorce or dissolution of the registered partnership.[311] Different schemes provide for

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[302] USA.

[303] *Şerife Yiğit v Turkey*, (App. 3976/05), 2 November 2010 [GQ], ECHR and also see *Refah partisi and others v Turkey*, (App. 41340/98, 41342/98, 41343/98 and 41344/98), 13 February 2003 [GQ], ECHR.

[304] Argentina: Corte Suprema de Justicia de la Nación 5 February 1998, S.526.XXVI, retrieved at http://www.csjn.gov.ar/ on 22 October 2014.

[305] This is not the case for example in Finland; Germany: Bundesgerichtshof 19 December 1989, *NJW* 1990, 703.

[306] Portugal.

[307] Belgium.

[308] For example Argentina: art. 230 Civil Code.

[309] France.

[310] Germany.

[311] Belgium; Croatia; Finland; France; Poland; Romania; USA.

– property division – albeit that the human capital such as earning capacity in which the other partner may have invested usually is not included in property,[312]
– financial support,
– in some systems also compensatory payment,[313]
– pension splitting[314] and
– the rights on the household home and assets[315]
– in only a few systems damages.[316]

Those schemes are applied independently from each other, although the outcome of one scheme may of course influence the outcome of another one.[317]

In other legal systems, the aforementioned issues are dealt with as a whole in one scheme, for example of ancillary relief. The form of ancillary relief may be adapted to the specific case.[318]

Registered partners in a 'mini-marriage' and cohabitants in principle contractually arrange the consequences to their break-up.[319] As mentioned above, their situation nevertheless tends to institutionalise.

Contractual Freedom – Object Formal partners in most legal systems are fairly free to organise their shares in *matrimonial property*; the matter belongs to *patrimonium*.[320]

The same contractual freedom does not apply to a "*core*"[321] of rights and obligations that aim at compensating solidarity from the past and at safeguarding solidarity for the future. Particularly financial support and compensatory payments belong to a *matrimonium* on which no or little contractual freedom exists. In **English** case law, "*opting out of the fairness-strands of needs and compensation*"[322] is not easily accepted, even though private arrangements are easily allowed as long as those thresholds are not met.

Besides and as mentioned above, the general law of obligations and contracts is applied where *matrimonium* does not fairly compensate transfers in property or the contribution in kind by one partner to the wealth increase of the other. This may be particularly so in case the partners have opted for a separate property regime.

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[312] Italy.

[313] Finland; France; Germany; Greece; Ireland; Québec; Romania: art. 390 Civil Code; Spain; Taiwan.

[314] Germany; The Netherlands: art. 1:155 Civil Code.

[315] Germany.

[316] France: art. 266 Civil Code; Taiwan: art. 1056 Civil Code.

[317] Canada (Common Law); Finland; France; Poland; Portugal. More reluctantly: Denmark.

[318] England & Wales; Ireland; Scotland.

[319] Belgium.

[320] Scotland; USA.

[321] Germany: "*Kernbereich*".

[322] England & Wales.

(Cont'd) – Time Differences exist between legal systems regarding the moment from which partners may enter into an agreement. Most legal systems, but not all, allow formal parties to conclude prenuptial (or pre-registered partnership) agreements in which they may agree on both *patrimonium* and *matrimonium* rights and duties, even if they cannot wholly oust the courts' jurisdiction, at least with regard to *matrimonium* rights and duties.[323] More contractual freedom is allowed once the parties have entered into a formal relationship. They may then conclude postnuptial agreements, which mostly aim at organising a separation and then also are called separation agreements.[324] Only in some legal systems[325] parties are only allowed to conclude a divorce or dissolution settlement contract upon the dissolution of their relation.[326]

Within legal systems, differences also apply according to the object of the agreement. For example, agreements on property may be concluded already in prenuptial agreements, whereas agreements on support and compensatory payments are only possible in the framework of a divorce settlement.[327] Another example is the applicability of formal requirements to 'early agreements'.[328] Such requirements aim at preventing the weaker party from waiving his rights untimely. Once married or partnered, the partners are in fiduciary or confidential relationship and their transaction will not be considered as at arm's length.[329] Some legal systems seem to evolve towards a larger contractual freedom with regard to pre- and postnuptial agreements, to which court scrutiny will however apply at the time of the divorce (see hereinafter).[330]

(Cont'd) – Scrutiny Another way of protecting the weaker party is *ex ante* and *ex post* court scrutiny and jurisdiction, which we will elaborate in section "Court jurisdiction".

Court Jurisdiction

Plan

In section "Substantive family law", we have investigated private ordering in substantive family law. This paragraph concerns private ordering of the courts'

[323] For example England & Wales; Germany; USA.

[324] Canada (Common Law); Malaysia; Scotland; Spain: art. 90 Civil Code; USA.

[325] For example Belgium; Canada (Common Law); France; Québec: art. 423 Civil Code.

[326] In general: USA.

[327] For example Malaysia: s. 80 Law Reform (Marriage and Divorce) Act 1976; Québec; Romania; The Netherlands.

[328] Germany; Spain.

[329] USA.

[330] For example Germany; England & Wales; Spain.

jurisdiction with regard to the 'process' (Section "Plan") and 'product' (Section "Process: ADR") of conflict resolution in family law. The 'process' primarily concerns the courts' versus private jurisdiction to resolve family disputes where we will focus on Alternative Dispute Resolution (ADR). The 'product' refers to court scrutiny of the outcome of the process, both at the time of its execution in an agreement and at the time of its performance.

Process: ADR

General Remarks

ADR and Family Disputes

ADR is a form of contractualisation of the administration of justice – conceived as privatisation, this is contractualisation between citizens and not between a citizen and state courts.

In many legal systems ADR techniques are regulated particularly in family matters, with a view to fostering the intrinsic continuity of family relationships, even after the break-up of a couple.[331] The concern for continuity makes the receptiveness for ADR techniques less paradoxical than it seems in the light of family law exceptionalism.[332]

Beside ADR by a professional, the **Burundese**, **Cameroonian** and **Malaysian** reporters also refer to ADR by the family council or the *Bashingantahe* or *penghulu* (head of village).

Notwithstanding the legislatures' preference for ADR, many reports stress that ADR-techniques are not available in *status* matters[333] – with the exception of divorce (by mutual consent) in most legal systems and parenthood (particularly through surrogacy agreements) in some legal systems. But disputes on the *content* of the relationship between parents and children and between partners are preferably resolved through ADR techniques. Again, regulation of ADR techniques exists rather in the context of the dissolution of family formations than in the assumption of going concern.

We will hereinafter first draw the general framework of ADR techniques and subsequently consider their promotion by the State.

[331] Cameroon.

[332] Comp. USA.

[333] See more generally Greece; Turkey.

Legal Framework of ADR

Legal Framework

Some legal systems do not explicitly regulate ADR techniques (in the context of family disputes).[334] Other legal systems provide a legislative framework aiming at promoting the use of ADR techniques[335] or at the least charging the (family) courts to take into account agreements that parties may have reached through ADR.[336] The different ADR techniques represent a continuum, with blurred lines

- between the resolution of the dispute by the parties themselves or with the help from, or even by, a third party – for example Med-Arb[337] – and
- between out-court and in-court techniques.

Dispute Resolution by (Expert-Assisted) Parties Themselves

The least intrusive form of ADR is *attorney assistance* during the parties' negotiations. This technique is not explicitly regulated in most legal systems.[338] In some legal systems, the assistance by an attorney will be taken into account by the courts when scrutinising the agreements *ex post* (see hereinafter section "Process: ADR".).[339]

A somewhat more intense ADR technique is *collaborative law* (*convention de procedure participative*), for which a legal framework is available in the **French** civil code, particularly for spouses with a view of divorcing or separating (art. 2067 Civil Code). Collaborative law is also informally applied in other legal systems.[340]

Dispute Resolution with the Assistance of a Neutral Third Party

With regard to ADR with the assistance of a neutral third party, a distinction is usually made between

- mediation and conciliation on the one hand, and
- out-court and in-court ADR on the other hand.

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[334] For example England & Wales; remarkably also not in The Netherlands, which nevertheless "*considers itself as a leading country with regard to mediation*".

[335] For example Belgium; France; Portugal; Romania.

[336] Also see for France: art. 373-2-11° Civil Code.

[337] Canada (Common Law).

[338] Belgium; Finland.

[339] Canada (Common Law).

[340] Belgium; Germany; Québec; The Netherlands; USA.

The denominator *mediation* usually reflects a merely facilitating role of the third party, who will not himself provide the parties with advice and will not propose solutions himself. On the contrary, a *conciliator* may assume the latter roles. Out-court ADR refers to ADR which is applied outside the context of a pending action by a third party who is not a member of the court or its supporting services. As mentioned, the lines between these different forms are sometimes blurred.

In some legal systems, "*pre-trial* mediation"[341] is not only available on the market, but is also facilitated through specialised social welfare[342] or court services, sometimes at a reduced rate[343] or even free of charge.[344] *Pending court action*, some legal systems

- regulate the referral of the parties to mediation by the court,[345]
- provide in-court mediation services,[346]
- organise specific case management or settlement hearings[347] or even
- provide in-court mediation by specialised chambers or judges,[348] assisted by experts.[349] The specialised judge or chamber will not judge the case when no settlement is reached.

The action will be stayed awaiting the outcome of the mediation.[350] **Finland** and **Germany** also regulate *post-trial* "*enforcement mediation*" with a view of avoiding new court actions. For example, parties may appeal to specialised (in-court) mediation services, linked to social welfare or court services, in case of non-compliance with a visitation order concerning minor children in **Germany**.

Conciliation by (family) courts seems fairly widespread. In a first instance, a conciliation hearing or referral to a conciliator may be aimed at *reconciliation* and at getting the family 'back on track'.[351] Once family proceedings have started, a conciliation hearing usually is the (mandatory) first step towards resolving the dispute.[352] Other available forms of conciliation are comparable to in-court mediation be it[353] or not[354] by a specialised chamber or judge.

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[341] Portugal.

[342] Brazil; Croatia; Denmark; Ireland.

[343] Canada (Common Law); USA.

[344] For example Argentina; Denmark; Puerto Rico; Québec: in case there are minor children involved. Comp. Finland.

[345] For example Belgium; England & Wales; France; Germany; Poland; The Netherlands.

[346] For example Brazil; Canada (Common Law); Denmark; The Netherlands.

[347] Canada (Common Law); Ireland.

[348] For example Belgium; Canada (Common Law); Denmark; Québec.

[349] Finland.

[350] For example Denmark; Ireland; Portugal.

[351] Burundi; France; Greece; Malaysia; Poland.

[352] For example Cameroon; Canada (Common Law); Belgium; Finland; Germany; Québec.

[353] Belgium; Finland; Germany; Taiwan.

[354] France: art. 252 and 373-2-10 Civil Code; Poland.

Third Party Dispute Resolution

Resolution of family disputes by a third party may be achieved through arbitration,[355] or through a binding advice (*bindend advies*). The latter is not enforceable as an arbitral award and must be included in a settlement agreement (*vaststellingsovereenkomst*[356]) by the parties. Only the **Dutch** report refers to binding advice as ADR-technique and to the explicit regulation of settlement agreements in the civil code.

In view of the *status*-contract divide, some legal systems explicitly exclude family disputes from arbitration.[357] In other legal systems, arbitration is explicitly made available, albeit with the necessary safeguards for the weaker parties, for example in **Canada (Common-Law)** in order to avoid '*Shari'ah* awards' that are incompatible with state law.[358] In most legal systems, no explicit provisions on arbitration in family matters exist. Some reports state that arbitration is not available since parties may not freely dispose of their *status*.[359] These reports do not seem to consider the potential of arbitration in disputes concerning not *status* as such, but the content of family formations, such as maintenance.[360] Arbitration seems possible in that respect and all in all it is emerging in family disputes, even in absence of explicit regulation.[361] In South **Germany**, a specific Family Arbitration Court was created in 2006. Arbitration still is more easily accepted in family property regimes than it is with regard to personal rights and duties, such as contact and visitation rights.[362]

Promotion of ADR

Information on ADR

ADR in family matters is promoted in different phases of family disputes. In some legal systems, social welfare services will already provide information to their clients.[363] In other legal systems, also legal professionals – particularly attorneys – are obliged to provide information on ADR techniques.[364] Once a petition to court

[355] USA.

[356] The Netherlands: art. 7:900–906 Civil Code.

[357] Brazil: art. 852 Civil Code; Greece; Romania: art. 542 Code of Civil Procedure; Québec: art. 2639 Civil Code.

[358] Canada (Common Law).

[359] Croatia; Finland; France; Portugal; Taiwan.

[360] See also Greece.

[361] England & Wales; Finland; Germany; Scotland; The Netherlands.

[362] Turkey.

[363] Denmark; Finland.

[364] Canada (Common Law); England & Wales; Québec.

is made, some legal systems regulate information on ADR by the Civil[365] or Court Registrar.[366] Finally, many legal systems impose on the courts themselves to inform and to propose ADR to the parties at the first hearing.[367]

Mandatory ADR

Some legal systems have adopted norms on mandatory ADR.

Firstly, an ADR-clause may have been agreed between the parties, be it or not *ad hoc*. If that is the case, some legal systems require the parties to at least attempt ADR and will stay proceedings to that end.[368] In other legal systems, ADR-clauses are only *indirectly* imposed on the parties, for example by applying liquidated damages[369] or penalty clauses or by imposing the costs of court proceedings on the non-compliant party.[370] Other legal systems provide *no direct or indirect* enforcement of ADR-clauses,[371] for mandatory ADR is not considered desirable and ousting court jurisdiction is not accepted in family matters. The ADR-clause is merely a gentlemen's agreement in those systems.[372]

Secondly, in some legal systems mandatory ADR applies even if the parties did not agree on an ADR-clause. For example in **Germany**, applicants to the court must explain whether or not they tried ADR and whether or not ADR is contraindicated in the case at hand. Other legal systems impose that parties must have been informed on ADR by a professional,[373] or have attended an information session[374] or even had a first meeting[375] with a mediator either as a prerequisite for petitioning the court, or upon court order. A minority of legal systems furthermore obliges an attempt to effectively resolve their dispute through ADR in some cases.[376]

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[365] Portugal: art. 1774 Civil Code.

[366] Belgium.

[367] Belgium; England & Wales; France; Ireland; Poland; Portugal: art. 1774 Civil Code and art. 147°-D Act 314/78 of 27 October 1978, retrieved at http://www.pgdlisboa.pt/ on 9 June 2014; Puerto Rico; Turkey. Comp. Germany.

[368] Canada (Common Law); Belgium; Germany.

[369] For example in Germany.

[370] Comp. Germany.

[371] Greece; Ireland; Romania. Comp. Germany.

[372] France.

[373] Croatia; Ireland; Québec.

[374] Argentina; Canada (Common Law); England & Wales; Germany; Poland; Romania; Québec.

[375] Croatia; France: art. 255, 2° (with regard to divorce) and 370-2-10 (with regard to parental responsibilities) Civil Code; Puerto Rico; Taiwan.

[376] Argentina; Cameroon; Canada (Common Law); France: on an experimental basis Act n° 2011–1862, retrieved at http://www.legifrance.gouv.fr/ on 9 June 2014; Malaysia; Taiwan; USA.

Mandatory ADR never applies when it is manifestly contraindicated, for example in case of urgency proceedings or for other legitimate reasons that corrupt equal bargaining positions such as domestic violence and child protection cases.[377] Other legal systems reject mandatory ADR altogether for it is considered undesirable.

Mandatory ADR seems a negation of private ordering anyhow.

Product: Court Scrutiny

A Priori Scrutiny

Enforceability Without Court Scrutiny

The product of the ADR process is as enforceable as a judgment or court order in some legal systems. This is mostly the case for *arbitral awards*[378] and for settlement agreements in the form of a *notarial deed*.[379] The intervention of an arbitrator or a notary public may be considered as hallmark that guarantees that both process and product have been monitored. In other systems, the enforceability also applies to other agreements (that are recorded).[380]

Enforceability Subject to Court Scrutiny

In most legal systems however, *all* family agreements, including arbitral awards,[381] need to be approved (or homologated or ratified or included in a consent order or granted leave for enforcement) by an administrative[382] or judicial body in order to be enforceable.[383] This is particularly (but sometimes only)[384] so for agreements concerning (custody of) minor children.[385] As the **Irish** report puts it:

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[377] Argentina; Canada (Common Law); Taiwan; Turkey; USA.

[378] Canada (Common Law); Germany; Greece; Ireland; Portugal.

[379] Belgium; Croatia.

[380] Canada (Common Law); Denmark; Finland; England & Wales; Germany; Ireland; Portugal; Romania; Scotland; Taiwan.

[381] For example England & Wales insofar children are concerned.

[382] Denmark; Finland.

[383] For example Cameroon; Belgium; Brazil; England & Wales; France; Greece; Ireland; Poland; Portugal; Puerto Rico; Québec; The Netherlands; Turkey. In Malaysia, this is dependent on what the court may have determined.

[384] For example Germany: § 156(2) Act on Family Proceedings (FamFG), retrieved at http://www.gesetze-im-internet.de/ on 11 June 2014.

[385] Belgium; Brazil; Canada (Common Law); Croatia; Finland; Portugal; Romania; Turkey; USA. This is not necessarily so in Poland.

> lawmakers have long asserted the importance of the state's capacity to retain ultimate control over the resolution of family disputes. Although this conflicts with the notion and practice of private contract law and the capacity of individuals to freely and voluntarily enter into a binding contract, such state involvement is permitted and even encouraged in family law given the underlying and inescapable issues of public policy that arise.[386] [. . .] In particular the Irish courts have regarded themselves responsible for the protection of vulnerable family members, recognising the imbalance of power that might often exist within a family unit.

We will now elaborate the different levels of court scrutiny that apply, depending on the process applied and on the subject matters of the agreement.

(Cont'd). Process Applied In order to promote ADR, some legal systems provide for proceedings *light* or for a lower level of scrutiny for the approval of family agreements achieved through ADR compared to other agreements.[387] This is particularly and naturally the case for agreements reached through in-court ADR.[388] In **Romania**, a whistle-blower's function applies to the out-court mediator: he must petition the court in certain circumstances in which the parties do not have equal bargaining positions or in which the child's interest is in danger.[389]

Different standards of scrutiny may also apply according to the moment on which the agreement was reached: closer scrutiny for example may apply to a prenuptial agreement than to a separation agreement.[390] Such different standards do not apply in all legal systems.[391]

(Cont'd). Subject Matters The administrative or judicial body will always screen the agreements for infringements of the public policy ('*ordre public*') or *bona mores*.[392] In some legal systems, this is the only scrutiny applying in order to receive leave for enforcement of an arbitral award.[393]

Agreements are not always further scrutinised insofar they concern the adults involved. In some systems, no scrutiny at all applies (to certain agreements).[394] In

[386]For example in the context of a marital breakdown dispute in *The State (Bouzagou) v Station Sergeant, Fitzgibbon Street Garda Station* [1985] IR 426 Barrington J noted that in the absence of an agreement between the husband and wife, the task of reconciling the rights of the individual members of the family was a matter for the courts to determine.

[387]Cameroon; Belgium; Denmark; France: Decree n° 2010–1395 of 12 November 2010, retrieved at http://www.legifrance.gouv.fr/ on 9 June 2014; Romania; Turkey.

[388]For example Belgium; Germany.

[389]Romania. Comp. Turkey.

[390]Québec.

[391]Scotland.

[392]Brazil; Canada (Common Law); England & Wales.

[393]Belgium; The Netherlands.

[394]Belgium; The Netherlands.

other systems, at least marginal scrutiny applies.[395] For example in **France**, the court will assess whether the interests of both spouses are preserved[396]; that is: whether the agreement is equitable.[397] Sometimes, scrutiny will be stricter insofar the agreements concern personal rights – particularly *status* – and support,[398] compared to agreements on property rights. In some legal systems, not only the product but also the process will be assessed, particularly whether the parties had equal bargaining positions and freely consented.[399] One of the assessment criteria may then be whether or not the parties have received independent legal advice.[400]

The highest level of scrutiny applies to agreements concerning minor children, and particularly with regard to personal aspects such as custody and visitation.[401] A continuum seems to apply with regard to the applicable scrutiny. At the one end, a *positive standard* applies, under which the courts just *may*,[402] but sometimes *must*,[403] take into consideration private arrangements that according to the court (evidently, in case marginal scrutiny applies) serve the best interest of the child.[404] At the other end of the continuum, a *negative standard* applies, under which the courts may only set aside such arrangements in case they (evidently) do not sufficiently preserve the best interest of the child or are (evidently) contrary to the best interests of the child.[405] In some legal systems, both standards are used for different agreements. However different the starting point, the outcome of both approaches seems comparable nevertheless. In some legal systems, the court will also scrutinise the process, for example the parents' free consent.[406]

(Cont'd). Consequences Usually, the administrative or judicial body will refuse to approve the agreement in case it infringes the applicable benchmark, and remit it to the parties[407] or the arbitrator.[408] Only rarely would a state body also have

[395] Finland; Puerto Rico; Scotland; Spain; Turkey; USA.

[396] France: art. 268 Civil Code.

[397] France.

[398] Finland.

[399] France: art. 232 Civil Code; Portugal. On gender inequalities see Italy; Taiwan.

[400] Canada (Common Law).

[401] For example England & Wales; Finland; Scotland.

[402] For example Finland; France; Greece; Portugal.

[403] France; Poland.

[404] Croatia; France; Québec.

[405] Belgium; England & Wales; France: art. 232 and 373-2-7 Civil Code; Germany; Ireland; Portugal; Romania; The Netherlands: only marginal scrutiny; Taiwan.

[406] France.

[407] Turkey.

[408] Canada (Common Law).

jurisdiction to modify the agreement at the applicant's request[409] or even *ex officio*.[410]

Controversy exists with regard to the binding effect of agreements that were not approved notwithstanding a requirement thereto.[411]

A Posteriori Scrutiny

Context Courts – or rarely administrative bodies – may be required to scrutinise a family agreement *ex post*. The courts' jurisdiction in this regard is very differently conceived throughout the world. Moreover, the courts' jurisdiction in family matters does not necessarily mirror a legal system's stance with regard to the binding effect of contracts in general private law. In some legal systems, the courts' jurisdiction to nullify or modify a family agreement is quite large compared to general contract law.[412] The traditional *status*-contract divide justifies such large competence. Yet in other legal systems, the courts' competence is quite limited vis-à-vis contract law in general.[413] One of the reasons is that the tenets of general contract law are more difficult to apply to family agreements. Unconscionability in divorce settlements is one example. Consideration can only be assessed taking into account the specific context of the case; the court *inter alia* may take into account that the unequal division of property is the price one spouse pays for a swift divorce or in order to avoid support payments.[414]

Levels of Scrutiny Different levels of court scrutiny apply according to whether the petition targets the circumstances of the *execution* of the contract, the circumstances of the *performance,* or the content of the agreement with regard of the *children*. A two-step standard applies in different legal systems with regard to the judicial review of an agreement on the basis of unfairness (in the broad sense) at the time the execution ('*sittenwidrigkeit*') or of the performance ('*treuwidrigkeit*') of the agreement.[415] In **Canada (Common-Law)**, this is the *Miglin v Miglin*-enquiry,[416]

[409]Canada (Common Law).

[410]Croatia; Malaysia: s. 80 Law Reform (Marriage and Divorce) Act 1976, retrieved at http://www.agc.gov.my/ on 11 June 2014: approval *subject tot conditions* is possible.

[411]For example Poland.

[412]Canada (Common Law): *Rick v Brandsema* 2009 SCC 10, retrieved at http://scc-csc.lexum.com/ on 11 June 2014.

[413]Belgium; France; Germany; Scotland; The Netherlands.

[414]Belgium: Cass. 9 November 2012 (2 judgments), Justel N-20121109-7 and N-20121109-9, retrieved at http://jure.juridat.just.fgov.be/ on 11 June 2014.

[415]England & Wales; Germany; The Netherlands: art. 1:158 Civil Code. Also see Taiwan: art. 1030–1 Civil Code.

[416]Canada (Common Law); Québec and *Miglin v Miglin* 2003 SCC 24, retrieved at http://scc-csc.lexum.com/ on 11 June 2014.

even though the Canadian Supreme Court may have determined a lower threshold for judicial review meanwhile.[417] In **England & Wales**, *Radmacher v Granatino* currently is the lead case, in which *needs* and *compensation* were determined as most important strands under the fairness test.[418] In **Germany**, the *Bundesverfassungsgericht* and the *Bundesgerichtshof* developed the two-step approach in subsequent cases on the basis of the Constitutional right to self-determination. They have determined two thresholds for judicial review: one procedural, which "triggers" judicial review, and one substantive, serving to determine the minimum required solidarity between ex-spouses. Hereto, an order of rank has been drawn of rights and obligations that concern the fundaments of post-divorce solidarity ('*Kernbereich*'). The more the agreement deviates from that *Kernbereich*, the higher the level of scrutiny will be.

Scrutiny of the Execution of the Agreement

Public Policy and Good Morals First, an assessment of the possible infringement of the public policy ('*ordre public*') or *bona mores* applies, for example with a view of nullifying a '*Shari'ah*-agreement' that is incompatible with state norms.[419]

No *consensus ad idem* A family agreement may be (partly) declared null and void on the basis that there was no *consensus ad idem* at the time of its execution. As mentioned above, this is not necessarily a one-to-one application of general contract law. Controversy for example has arisen over the effect of the nullification of a divorce settlement on the divorce itself.[420] The importance of stability of family relations has also been stressed in this regard.

One widespread ground for (partly) nullification is *abuse of circumstances and excessive benefit*.[421] Both conditions need to be fulfilled: inequality must exist both in the process and in the outcome.[422] On the one hand, abuse of circumstances refers to the unequal bargaining position of one party during the process (arm's length

[417]Canada (Common Law): *LMP v LS* 2011 SCC 64, retrieved at http://scc-csc.lexum.com/ on 19 June 2014.

[418]England & Wales: *Radmacher v Granatino*, UKSC 2009/0031, retrieved at http://www.supremecourt.uk/decided-cases/ on 19 June 2014.

[419]Canada (Common Law).

[420]Belgium: Cass. 16 March 2000, Justel N-20000616-10, retrieved at http://jure.juridat.just.fgov.be/ on 11 June 2014; France: Cass. 6 May 1987, N° 87–10107, retrieved at http://www.legifrance.gouv.fr/ on 11 June 2014.

[421]Belgium: Cass. 9 November 2012 (2 judgments), Justel N-20121109-7 and N-20121109-9, retrieved at http://jure.juridat.just.fgov.be/ on 11 June 2014; Brazil; Canada (Common Law): s. 93(3)(b) Family Law Act SBC 2011, retrieved at http://www.bclaws.ca/ on 11 June 2014 and *Miglin v Miglin* 2003 SCC 24, retrieved at http://scc-csc.lexum.com/ on 11 June 2014; Greece; Italy; Québec; Spain; Taiwan; The Netherlands; Turkey.

[422]Finland; Germany; Scotland: *Gillon v Gillon (No 3)* 1995 SLT 678 *at* 681 C-E.

principle). Such inequality will however only be taken into account in case it has led to excessive benefit for the other party or an excessive burden for the one party. On the other hand, also the unequal outcome as such is not sufficient; it must have been caused by abuse of circumstances – even though it seems that some courts accept a presumption to that effect. Unequal bargaining positions may be difficult to assess *ex post* otherwise than on the basis of the unequal outcome.[423] The inequality of the outcome moreover must be assessed at the time of the execution, without hindsight,[424] and not at the time of the performance of the agreement.

Other grounds on the basis of which *consensus ad idem* may be challenged are the fiduciary duty of disclosure[425] and the lack of qualitative assistance by an expert.[426]

Disrespect of ADR-Principles The validity of the agreement may also be disputed on the ground of non-respect of the principles of ADR, for example in case the mediator has been partial or did not safeguard equal bargaining positions between the parties.[427]

Scrutiny of the Performance of the Agreement

Context In cases where scrutiny of the execution of an agreement does not offer a solution, a party may also apply for judicial review on the basis of scrutiny of the *performance* of the agreement. Finality of agreements is one of the fundamentals of contract law. Exceptions to the principle of finality are however accepted in all legal systems, albeit to a quite different extent.[428]

Public Policy and Good Morals Public policy reasons may always justify the review of a family agreement, for example in case one of the parties would remain or become dependent on social security or social assistance regimes.[429]

Hardship In other legal systems, judicial review of an agreement is possible only in case of hardship, for example because performance would be unreasonable and unfair or contrary to good faith or because the agreement has become significantly

[423] Germany.

[424] Scotland.

[425] Canada (Common Law): s. 56(4)(a) Family Law Act RSO 1990, c F3, retrieved at http://www.e-laws.gov.on.ca/ on 11 June 2014 and s. 93(3)(a) Family Law Act SBC 2011, retrieved at http://www.bclaws.ca/ on 11 June 2014; England & Wales; Ireland; Scotland.

[426] Québec: *Pelech v Pelech* [1987] 1 SCR801, retrieved at http://scc-csc.lexum.com/ on 11 June 2014 and *Hartshorne v Hartshorne*, 2004 SCC 22, retrieved at http://scc-csc.lexum.com/ on 2 May 2014; Scotland: *Gillon v Gillon (No 3)* 1995 SLT 678 *at* 681 C-E.

[427] Romania.

[428] See in general USA.

[429] Canada (Common Law): s. 33(4)(b) Family Law Act RSO 1990, c F3, retrieved at http://www.e-laws.gov.on.ca/ on 11 June 2014; Finland; Germany; Ireland; Québec; Spain; Turkey.

unfair.[430] Sometimes the courts will also take into account the circumstances of the case at the time of the execution of the agreement in order to assess its unfairness at the time of the performance.

Rebus sic stantibus In most legal systems, hardship is not (always) required. The doctrine of fundamental change of circumstances (*clausula rebus sic stantibus*) is easily accepted for some family agreements (between adults,) particularly concerning personal rights, support and compensatory payments, yet less or even not for agreements on property.[431] Variability of agreements in function of changed circumstances is generally considered fundamental, particularly for maintenance obligations.[432] The **Italian** report explains that this is the case because agreements between partners

> are presumed to be grounded in solidarity rather than in the allocation of risk.

Hence in some legal systems, the courts *in every case* maintain jurisdiction to award or vary support, whichever settlement the parties may have reached.[433] Conditions generally applicable are that the change of circumstances must be unexpected or unforeseeable and anyhow must occur independent from the will of the parties. In some legal systems, a strict view is taken on change of circumstances.[434] For example in *Miglin v Miglin*, the **Canadian** Supreme Court determined

> that a certain degree of change is foreseeable most of the time. [The parties] must be presumed to be aware that the future is, to a greater or lesser extent, uncertain. It will be unconvincing, for example, to tell a judge that an agreement never contemplated that the job market might change, or that parenting responsibilities [. . .] might be somewhat more onerous than imagined, or that a transition into the workforce might be challenging. Negotiating parties should know that each person's health cannot be guaranteed as a constant. An agreement must also contemplate, for example, that the relative values of assets in a property division will not necessarily remain the same. Housing prices may rise or fall. A business may take a downturn or become more profitable. Moreover, some changes may be caused or provoked by the parties themselves. A party may remarry or decide not to work. [. . .] That said, we repeat that a judge is not bound by the strict Pelechstandard to intervene only once a change is shown to be "radical". [. . .] The test here is not strict foreseeability; a thorough review of case law leaves virtually no change entirely unforeseeable. The question,

[430]Canada (Common Law): s. 93(5) Family Law Act SBC 2011, retrieved at http://www.bclaws.ca/ on 11 June 2014 and *Miglin v Miglin* 2003 SCC 24, retrieved at http://scc-csc.lexum.com/ on 11 June 2014; Denmark: § 52 Marriage Act; Romania.

[431]Cameroon; Germany: § 313 BGB; Ireland; Romania; Spain; Taiwan; USA.

[432]Belgium; Canada (Common Law): *LMP v LS* 2011 SCC 64, retrieved at http://scc-csc.lexum.com/ on 11 June 2014; England & Wales; Malaysia: s. 84 Law Reform (Marriage and Divorce) Act 1976, retrieved at http://www.agc.gov.my/ on 11 June 2014.

[433]Canada (Common Law); Croatia; Ireland; Malaysia; Portugal; Puerto Rico; USA.

[434]For example in England & Wales: reference to the "Barder criteria" as developed on the basis of *Barder v Barder* (*Caluori intervening*) [1988] AC 20; Finland.

> rather, is the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the court at the time of the application.[435]

In some cases, the court may not change certain clauses, for example the agreed duration of post-divorce support; it then only has competence to modify the amount of support payable.[436]

Initial Unfairness Exceptionally no change of circumstances or current unfairness is required. For example the **Canadian**, **Danish**, **Dutch** and **Finnish** courts may set aside or modify an agreement on maintenance in case of gross misjudgement of the statutory standards at the time of executing the agreement.[437]

Contractualisation Parties to a family agreement in some legal systems have some liberty to exclude, or to rather extend, courts' jurisdiction on the ground of fundamental change of circumstances.[438] Other systems do not allow waivers with regard to some aspects, for example post-divorce support.[439]

Scrutiny in the Best Interest of the Child

Different Approaches In some legal systems, parents may not be allowed to modify their agreement on the children by mutual consent without new judicial approval.[440] The courts may anyhow review all agreements in the best interests of the child in all legal systems.

No common ground exists with regard to the conditions and the level of scrutiny applying. In some legal systems, the "*yardstick*"[441] of the welfare of the child allows courts (or administrative bodies) to "generously" [442] review family agreements even in absence of a (fundamental) change of circumstances.[443] In other systems, the best interest of the child is only the underlying standard in case of review of an agreement based on a (fundamental) change of circumstances, which will be broadly

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[435] *Miglin v Miglin* 2003 SCC 24, par 89, retrieved at http://scc-csc.lexum.com/ on 11 June 2014; Québec.

[436] USA.

[437] Canada (Common Law); Québec: *Miglin v Miglin* 2003 SCC 24, retrieved at http://scc-csc.lexum.com/ on 11 June 2014; Denmark; Finland; Netherlands: art. 1:401(5) Civil Code.

[438] Belgium; Scotland: s. 16(1)(a) Family Law (Scotland) Act 1985, retrieved at http://www.legislation.gov.uk/ on 11 June 2014; The Netherlands: art. 1:158 Civil Code.

[439] Malaysia: s. 84 and s. 97 Law Reform (Marriage and Divorce) Act 1976, retrieved at http://www.agc.gov.my/ on 11 June 2014; Portugal. Partly in The Netherlands.

[440] USA.

[441] England & Wales.

[442] Canada (Common Law).

[443] Belgium; Denmark; France: art. 373-2-13; Germany; Ireland; Malaysia: s. 97 Law Reform (Marriage and Divorce) Act 1976, retrieved at http://www.agc.gov.my/ on 11 June 2014; Portugal; Taiwan.

interpreted.[444] Other legal systems take a third stance, in-between. They allow judicial review in the best interest of the child, as long as that would not undermine the stability and continuity of the circumstances in which a child is raised.[445] A time moratorium may be applied to untimely requests for review.[446]

In either case, the many existing standards of scrutiny often are quite vague[447] and may be conceived positively or negatively. In some systems, a higher level of scrutiny seems to apply than is the case for the initial approval of agreements. For example, full scrutiny instead of marginal scrutiny applies when reviewing an agreement.[448]

Contractualisation? As mentioned above in Section "Court Scrutiny"., family agreements regarding children "*are not intended to have contractual effect*".[449] The free revocability of agreements between the parents[450] nevertheless seems the exception. For example § 1 of the **German** Act on the Religious Upbringing of Children explicitly provides that "the agreement between the parents is revocable at any time". Mostly such agreements are considered to be binding for the parties.[451] The **Netherlands** even reinforces the binding effect by imposing 'parenting plans'. Revocability by a parent thus depends on the existence of a weighty reason.[452] Article 376-1 **French** Civil Code provides that

> the Family Court may [...], take into consideration the pacts [...], unless one of [the parents] substantiates weighty reasons that would justify him to revoke his consent.

The courts may however always vary agreements in the light of the abovementioned criteria: agreements are not binding upon them even if they would be for the parties themselves.[453]

Conclusions

Pendular Movement

The perpetual pendular movement of family law between *status* and contract (already Maine 1861) paradoxically went in both directions the last decades. On

[444] Finland; Québec; Romania; The Netherlands; USA.

[445] Finland; France; Ireland; Portugal.

[446] USA.

[447] Finland.

[448] For example in Belgium: art. 387*bis* Civil Code; Germany.

[449] Scotland.

[450] Finland; Germany; Greece; Ireland; Malaysia; Poland; Portugal; Scotland.

[451] Belgium.

[452] For example Croatia; Netherlands.

[453] For example Scotland.

the one hand, there is a convergent trend towards more room for private ordering in 'old' or traditional family formations. One example is the acceptability of pre- or postnuptial agreements, particularly in **England & Wales**. On the other hand, 'new' family formations tend to institutionalise, which is clearly a trend towards *status*. Examples are the crystallisation as statuses of surrogacy, of same-sex partnerships and so on.

The trend towards contract concerns the *content* of parenthood or partnerships than their *formation* and *dissolution*. Moreover, *procedural* contractualisation seems further reaching than *substantive* contractualisation. The acceptance of ADR in family disputes seems somewhat inconsistent with the exceptionalist position of substantive family law though.[454]

The trend towards status does not only concern the formation and dissolution of family relations but also their content. For example, we found remarkable convergence with regard to judicial review of nuptial agreements and divorce settlements on the ground of unfairness in section "Process: ADR".

Both evolutions to contract and to status can be explained as forms of constitutionalisation of family law. On the one hand, individualisation offers greater freedom for each family member both within and outside the *numerus clausus* of family relations. On the on the other hand, the freed individuals are placed directly under State control under the interventionist trend in private law in general al described in section "Main features of family law".

What's in a Word?

The working title for this chapter and for the session at the 2014 International Congress of Comparative Law was 'Contractualisation of Family Law'. That title was much criticised, in that the word 'contractualisation' cannot be used in its legal-technical meaning as enforceable rights and obligations with civil effect, with a view of describing trends in family law.[455]

Firstly, the limits of contractual freedom are considered more important than the freedom itself, and mostly freedom would be limited to exercising available legal options, for example with regard to surrogacy or covenant marriages. 'Intention' or 'autonomy' would therefore be better denominators than contractualisation.[456]

Secondly, a basic principle of contract law is the binding effect and finality of contracts, vis-à-vis both the parties and third parties, and vis-à-vis courts. Hence, many exceptions to this basic principle apply in family law.

'Private ordering' for these reasons is preferable over 'contractualisation' to describe current evolutions in family law. The word 'agreement' or 'pact' also are

[454] USA.

[455] For example Germany; Spain.

[456] Spain.

preferable over 'contract', or at the least would the word contract receive the epithet '*domestic*'. In sum, these instruments are characterised by a 'family law' rather than 'contractual' nature.

Exceptionalism?

The question however arises what makes a contract 'domestic' of nature and what distinguishes it from a contract regulated by general contract law. The many blurred lines between private ordering and contractualisation persist that justify questioning the blunt rejection of contractualisation.

Different reports[457] have also pointed at the interventionist approach of the State in other fields of private law as well, as form of constitutionalisation. There is no clear answer to the questions whether or not scrutiny is *stricter* and whether or not judicial review is *easier* in family settings compared to contract law in general. State interventionism in contract law in general anyhow makes family law less exceptional. It would be interesting to further research the differences in the levels of judicial review so as to determine what is the specific nature of 'domestic contracts'.

Marvin v Marvin Versus Borelli v Brusseau

The question first arises why contractual freedom should not be the basic assumption for parties to a family formation. This question is strikingly illustrated by the *Marvin* and *Borelli* cases, concerning cohabitants and spouses respectively.[458]

In *Marvin v Marvin*,[459] Michelle Marvin had been in a cohabitation relationship with Lee Marvin during six years, after which he compelled her to leave his household. While Michelle Marvin had given up her lucrative career, substantial real and personal property was acquired only in the name of Lee Marvin. Michelle Marvin claimed that

> she and defendant "entered into an oral agreement" that while "the parties lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined." Furthermore, they agreed to "hold themselves out to the general public as husband and wife" and that "plaintiff would further render her services as a companion, homemaker, housekeeper and cook to . . . defendant."

The Californian Supreme Court accepted the validity of such agreement for

[457] For example Germany.

[458] Also see Italy.

[459] *Marvin v Marvin* (1976) 18 Cal.3d 660, retrieved at http://online.ceb.com/calcases/C3/18C3d660.htm on 24 April 2014.

> adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason. (. . .) So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.

We also have pointed at a trend towards 'matrimonialisation' of such contracts between cohabitants.

Surprisingly, spouses (and registered partners) are not "as competent as any other persons to contract respecting their earnings and property rights". Whereas postnuptial agreements and divorce settlements are increasingly accepted, contracts on efforts and earnings when going concern are only rarely qualified as civil contracts. The matter was discussed in the (in-)famous case of *Borelli v Brusseau*.[460] Hildegard Borelli was married to Michael Borelli in 1980 with an antenuptial contract excluding her from most of Michael Borelli's property. Michael Borelli then suffered severe heart problems and became concerned and frightened over his health.

> In August 1988, decedent suffered a stroke while in the hospital. "Throughout the decedent's August, 1988 hospital stay and subsequent treatment at a rehabilitation center, he repeatedly told [appellant] that he was uncomfortable in the hospital and that he disliked being away from home. The decedent repeatedly told [appellant] that he did not want to be admitted to a nursing home, even though it meant he would need round-the-clock care, and rehabilitative modifications to the house, in order for him to live at home."
>
> 651 "In or about October, 1988, [appellant] and the decedent entered an oral agreement whereby the decedent promised to leave to [appellant] the property listed [above], including a one hundred percent interest in the Sacramento property.... In exchange for the decedent's promise to leave her the property . . . [appellant] agreed to care for the decedent in his home, for the duration of his illness, thereby avoiding the need for him to move to a rest home or convalescent hospital as his doctors recommended. The agreement was based on the confidential relationship that existed between [appellant] and the decedent."
>
> Appellant performed her promise but the decedent did not perform his. Instead his will bequeathed her the sum of $100,000 and his interest in the residence they owned as joint tenants. The bulk of decedent's estate passed to respondent, who is decedent's daughter.

Unfortunately for Mrs Borelli, the Californian Supreme Court did not accept the oral agreement as a binding contract, for

> It is fundamental that a marriage contract differs from other contractual relations in that there exists a definite and vital public interest in reference to the marriage relation. [. . .]
>
> "Indeed, husband and wife assume mutual obligations of support upon marriage. These obligations are not conditioned on the existence of community property or income."[. . .]
>
> When necessary, spouses must "provide uncompensated protective supervision services for" each other.
>
> Estate of Sonnicksen (1937) 23 Cal. App.2d 475, 479 [73 P.2d 43] and Brooks v.Brooks (1941) 48 Cal. App.2d 347, 349–350 [119 P.2d 970], each hold that under the above statutes

[460] *Borelli v Brusseau* 12 Cal. App.4th 647 (1993), retrieved at http://scholar.google.com/ on 21 June 2014.

> and in accordance with the above policy a wife is obligated by the marriage contract to provide nursing-type care to an ill husband. Therefore, contracts whereby the wife is to receive compensation for providing such services are void as against public policy; and there is no consideration for the husband's promise. [. . .]
>
> [T]he duty of support can no more be "delegated" to a third party than the statutory duties of fidelity and mutual respect (Civ. Code, § 5100). Marital duties are owed by the spouses personally. [. . .]
>
> We therefore adhere to the long-standing rule that a spouse is not entitled to compensation for support, apart from rights to community property and the like that arise from the marital relation itself. Personal performance of a personal duty created by the contract of marriage does not constitute a new consideration supporting the indebtedness alleged in this case. [. . .]
>
> The dissent maintains that mores have changed to the point that spouses can be treated just like any other parties haggling at arm's length. Whether or not the modern marriage has become like a business, and regardless of whatever else it may have become, it continues to be defined by statute as a personal relationship of mutual support. Thus, even if few things are left that cannot command a price, marital support remains one of them.

We have described that different legal and contractual mechanisms allow spouses to claim compensation – even in absence of need – of their 'performance' during marriage, at the time of its dissolution. We claim that contracts on compensation should be allowed when going concern, in order to prevent litigation.

In sum, the 'matrimonialisation' of the contractual relationship between cohabitants could be complemented with a 'contractualisation' of the marital relationship between spouses or registered partners.

The **Italian** and **Taiwanese** reports however point at the paradox that contractual freedom would not necessarily enhance gender equality in relationships. The State must anyhow safeguard the equal bargaining positions of the partners. If not, mostly women would be worse off in case they waive their default legal protection compared to when no contractual freedom would be allowed.

A commodification of the content of family formations also would have a much greater impact than the issues discussed in this chapter, and would also concern intergenerational solidarity and the relation between family law and social security law. The core question here is who should provide for *fraternité* as a safety net under *liberté* and *égalité*.

Balfour v Balfour Versus Meritt v Meritt

In the course of this chapter, we repeatedly pointed at the greater contractual freedom at the moment of dissolution of the family relation compared to the relation going concern. This is both the case for the relation between parents and children and between partners; and both with regard to substantive and procedural contractualisation.

In our opinion, the justification cannot be that the family relation is winded up at the time of its dissolution; those relations are intrinsically continuous, both between parents and children and between partners, for example with regard to post-divorce support.

A striking example of this discussion is offered in the *Balfour* and *Meritt* cases.

In *Balfour v Balfour*,[461] the husband had promised his wife to send monthly payments of £30,00 from Ceylon, where he resided for work, while his wife would stay in England for health reasons. After their divorce, the question arose whether the 'contract' was enforceable. The court of appeal found that it was not, for no intention to create legal relations existed. The lack of consideration was also considered important. The contract therefore was of a purely domestic nature.

In *Meritt v Meritt*,[462] the husband had left the house to live with another woman. Afterwards, the spouses discussed the arrangements to be made in the husband's car, whereby the husband

> wrote these words on a piece of paper:- "In consideration of the fact that you will pay all charges in connection with the house at 133 Clayton Road, Chessington, Surrey, until such time as the mortgage repayment has been completed, when the mortgage has been completed I will agree to transfer the property into your sole ownership. Signed, John Merritt. 25th May, 1966".

Denning LJ distinguished the case from the domestic arrangements in Balfour:

> It is altogether different when the parties are not living in amity but are separated, or about to separate. They then bargain keenly. They do not rely on honourable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations.

He therefore referred to his previous opinion that

> when husband and wife, at arms' length, decide to separate, and the husband promises to pay a sum as maintenance to the wife during the separation, the Court does, as a rule, impute to them an intention to create legal relations.

In sum, we claim that parties in family formations going concern may conclude enforceable contracts in case their intention thereto is clear and in case consideration remains within the contractual sphere allowed under their status. The **England & Wales** report however warns not to overrate the *Meritt* case, since the *Hyman*[463] principle, that parties may not oust the court jurisdiction beforehand, was confirmed in the 2010 *Radmacher* case.[464]

Court Jurisdiction

Parties in a family formation generally are not allowed to waive a core of rights and obligations arising out of their *status* as parents or partners. The lack of (valid)

[461] *Balfour v Balfour* [1919] 2 KB 571

[462] *Merritt v Meritt* [1970] EWCA Civ 6, retrieved at http://www.bailii.org/ew/cases/EWCA/Civ/ on 21 June 2014.

[463] *Hyman v Hyman* [1929] AC 601.

[464] *Radmacher v Granatino* [2010] UKSC 42, retrieved at http://www.bailii.org/uk/cases/UKSC/2010/42.html on 24 October 2014.

consideration therefore makes the arrangement domestic rather than contractual of nature.

We have also repeatedly pointed at the impossibility for parties to a domestic arrangement to oust the courts' jurisdiction and have pointed at court scrutiny and at the possibilities for judicial review of (family) arrangements. On the one hand, scrutiny is possible on the ground of unfairness (in its broadest sense) at the time of the execution or the performance of the agreement. Scrutiny is even stricter when it concerns children. On the other hand, the *clausula rebus sic stantibus* is broadly applied to family law agreements. Family law seems somewhat exceptional in this regard.

We therefore assert that, given the courts' jurisdiction to review family arrangements, greater contractual freedom may be accepted for the parties to a family formation going concern. For example, arrangements on parental responsibilities could be considered binding for the parents themselves.

"Good Boy Bad Boy"

One reason to exclude a contractual approach towards breach of contract in family relations is that family law was considered to offer its own particular remedies, for example fault divorce. Increasing repeal thereof causes family law agreements to be the only contracts where no fault-based remedies exist. So-called "Good Boy Bad Boy"-clauses may be proposed as ways to substitute the above-mentioned evolution.

ADR

ADR-techniques are increasingly promoted, and sometimes imposed on parties, as ways of dissolving family disputes. ADR in family disputes usually implies the intervention of a neutral third party – mediator of conciliator – with a view of enabling the parties to reach a settlement. More State attention may however be had for two other types of ADR. On the one hand, not all parties need a neutral third party, and forms of collaborative law could be promoted given the positive first experiences with these techniques. On the other hand, parties should not always be forced to litigate in case they do not reach a settlement even with the help of a neutral third party. Arbitration seemingly is an underestimated technique, which can be broadly applied to (the content of) family formations.

Parens Patriae

These conclusions have mainly drawn on family relations between adults. Private ordering of parenthood – for example with surrogacy agreements – remains the

exception throughout the world. Also, agreements on parental responsibilities and on maintenance are under strict scrutiny. This close monitoring can be justified under the *parens patriae* doctrine as functionally defined in Section "Main features of family law". One of the points of interest has been whether, and to what extent, *parens patriae* also applies to the weaker party in family relations between adults, be it or not under the label of protection of dignity.

In sum, even if family law exceptionalism would be on its return (again), it is increasingly substituted by State interventionism in private law in general.[465]

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[465] Germany.